(16,765.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 222.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, AND CHARLES ANDERSON EARLE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 14, 1898.

1*aa* United States Circuit Court of Appeals for the Second Circuit.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANDERSON EARLE, Defendants in Error.

Transcript of Record.

Error to the circuit court of the United States for the southern district of New York.

1*a* UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between John Henry Clayton, Nicholas Roberts and Charles Anderson Earle, plaintiffs, and The Texas and Pacific Railway Company, defendant, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company, as is said and appears by its complaint; we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States circuit court of appeals for the second circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 19th day of August, 1897, that the record and proceedings aforesaid being inspected, the said judges of the United States circuit court of appeals for the second circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 21st day of July, in the year of our Lord one thousand eight hundred and ninety-
2*a* seven, and of the Independence of the United States the one hundred and twenty-second.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.
[L. S.]

The foregoing writ is hereby allowed.
E. H. LACOMBE.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 3*a* to 165, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The Texas and Pacific Railway Company, plaintiff in error, against John Henry Clayton, Nicholas Roberts and Charles Anderson Earle, defendants in error, as the same remain- of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this ninth day of August, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-second.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) The U. S. circuit court of appeals for the second circuit. The Texas and Pacific Railway Company, plaintiffs in error *vs.* John Clayton *et al.*, defendants in error. Writ of error. Rush Taggart, attorney for plaintiff in error. Due service of a copy of the within writ of error is hereby admitted this 23rd day of July, 1897. Evarts, Choate & Beaman, attorneys for defendant- in error. U. S. circuit court. Filed Jul- 23, 1897. John A. Shields, clerk.

3*a* United States Circuit Court, Southern District of New York.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANderson Earle
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the city of New York, this 9th day of August, in the year one thousand eight hundred and ninety-five.

[L. S.] JOHN A. SHIELDS, *Clerk.*
EVARTS, CHOATE & BEAMAN,
Plaintiffs' Attorneys.

Office and post-office address, No. 52 Wall street, New York city.

4a United States Circuit Court, Southern District of New York.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANDERSON EARLE
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

The plaintiffs herein, by Evarts, Choate & Beaman, their attorneys, complain of the defendant, The Texas and Pacific Railway Company, and allege, upon information and belief, as follows:

First. At all the times hereinafter mentioned, the plaintiffs were and are now partners doing business as cotton merchants in the city of Liverpool, England, under the firm name of Newall & Clayton, and are subjects of the Queen of Great Britain and Ireland.

Second. At all the said times the defendant was and now is a railroad corporation duly created and existing under and by virtue of an act of Congress of the United States of America, approved March 3, 1871, and was and is now engaged in conducting the business of a common carrier of merchandise for hire from various places in the State of Texas to Westwego, in the State of Louisiana, and was and is an inhabitant of the southern district of New York.

Third. Heretofore, and in the month of October, 1894, at
5a Bonham, in the State of Texas, the plaintiffs delivered to the said defendant as such common carrier 500 bales of cotton, weighing 264,827 pounds, and the defendant then and there received the same and then and there undertook and agreed, as a common carrier as aforesaid, to carry the same, safely and securely, at a through price or rate of freight from the said place of shipment to Liverpool, England, by way of New Orleans, and thence to Liverpool, England, by the Elder, Dempster & Co.'s line of steamships, and there to deliver the same to the plaintiffs upon the payment of freight therefor.

Fourth. The said defendant has failed to keep its said agreements and to carry safely 467 of said bales of cotton to Liverpool, aforesaid, and there deliver the same to the plaintiffs, although the plaintiffs have duly demanded delivery thereof, and although they have been at all times ready and willing to pay the said freight for such carriage; and, through the negligence and carelessness of the defendant and without the fault of the plaintiffs, 467 bales of said bales of cotton, weighing upwards of 247,349 pounds, and of the value of seventeen thousand three hundred and fourteen and $\frac{43}{100}$ dollars, were, on or about the twelfth day of November, 1894, wholly destroyed by fire at Westwego, in the State of Louisiana aforesaid, at which time and place the same were in the possession of the defendant in the course of such carriage and as a common carrier as aforesaid. The bales so destroyed were marked as follows:

130 bales marked T C U P, 77 bales marked O X F O, 38 bales marked S A B O, 42 bales marked J A X O, 38 bales marked C A R L, 54 bales marked O A T S, 66 bales marked J P A N, and 22 bales marked Q B E E.

Fifth. The plaintiffs have duly demanded the payment to
6a them by the defendant of the said value of the said 467 bales of cotton thus destroyed, and have duly performed all the acts necessary for them to do under and by virtue of said agreements, but the defendant has refused to pay the plaintiffs the value of the bales of cotton destroyed, as aforesaid, or any part thereof, although the defendant has admitted that said bales of cotton were destroyed by fire at Westwego aforesaid.

Wherefore, the plaintiffs demand judgment against the defendant for the sum of seventeen thousand three hundred and fourteen and $\frac{43}{100}$ dollars, with interest thereon from the 12th day of November, 1894, besides the costs of this action.

EVARTS, CHOATE & BEAMAN,
Attorneys for the Plaintiffs, No. 52 Wall Street,
New York City, New York.

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss.:

I, Treadwell Cleveland, being duly sworn, depose and say as follows: I am one of the attorneys and of counsel for the plaintiffs in the above-entitled action, and have read the foregoing complaint and know the contents thereof; the same is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true. The grounds of my belief as to all the matters in said complaint not stated upon my knowledge are as follows, namely, the possession of the original documents relating to the shipment and value of the cotton and communications received from the defendant and others in relation to its destruction.

The reason why this verification is not made by the plaintiffs is
7a that the plaintiffs do not reside and are not within the city and county of New York, where the plaintiffs' attorneys reside or have their office.

TREADWELL CLEVELAND.

Sworn to before me this 9th day of August, 1895
MARVELLE C. WEBBER,
[L. S.] *Notary Public, New York County.*

(Endorsed:) United States circuit court, southern district of New York. John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle against The Texas and Pacific Railway Company. Summons and complaint. Evarts, Choate and Beaman, No. 52 Wall street, New York city, attorneys for the plaintiffs. I hereby certify that on the 16th day of August, 1895, at the city of New York, in my district, I personally served the within summons and complaint upon the within-named The Texas and Pacific Railway Company by exhibiting to Charles E. Satterlee, secretary of said company, the within original, and at the same time leaving with him a copy of each thereof. John H. McCarty, United States marshal, southern district of New York. Dated Aug. 22, 1895. U. S. circuit court. Filed Dec. 4, 1895. John A. Shields, clerk.

8a United States Circuit Court, Southern District of New York.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANDERSON EARLE, Plaintiffs,
against
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant.

The above-named defendant, by Rush Taggart, its attorney (protesting, however, that the court is without jurisdiction for the reason that the defendant is not an inhabitant of the southern district of New York and not consenting to the said jurisdiction), answers the complaint herein as follows:

First. Said defendant has no knowledge or information sufficient to form a belief as to any or either of the allegations contained in the paragraph or subdivision of said complaint designated first.

Second. The said defendant admits the allegations contained in the paragraph or subdivision of said complaint designated second, save and excepting the allegations that the defendant was and is an inhabitant of the southern district of New York, which said allegation defendant denies.

Third. Said defendant admits that heretofore and in the
9a month of October, 1894, at Bonham, in the State of Texas, there was delivered to the defendant by the plaintiff- certain cotton, being the number of bales specified in the paragraph or subdivision of said complaint designated third and destined as therein stated, but that defendant has no knowledge or information sufficient to form a belief as to the weight of said cotton, and the defendant denies each and every other allegation contained in the said paragraph or subdivision of said complaint.

Fourth. Said defendant admits that 467 bales of said cotton, marked as described in the paragraph or subdivision of the said complaint designated fourth, were destroyed by fire at Westwego, in the State of Louisiana, on or about the 12th day of November, 1894; but the defendant denies each and every other allegation in the said paragraph or subdivision contained.

Fifth. Said defendant admits the allegation contained in the paragraph or subdivision of said complaint designated fifth, to the effect that it has refused to pay the plaintiff- the value of the cotton destroyed as aforesaid, although admitting that it was destroyed by fire at Westwego; but said defendant denies each and every other allegation in the said fifth paragraph or subdivision contained.

Wherefore, the defendant demands that said complaint may be dismissed, with costs.

RUSH TAGGART,
Attorney for the Defendants,
No. 195 *Broadway, New York, N. Y.*

SOUTHERN DISTRICT OF NEW YORK, *City and County of New York,* } *ss.:*

Charles E. Satterlee, being duly sworn, says: That he is an officer of the defendant above named, The Texas and Pacific Railway

Company, to wit, the treasurer thereof; that he has read the
10a foregoing answer and knows the contents thereof; that the same is true, excepting as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

C. E. SATTERLEE.

Sworn to before me this 18th day of November, 1895.

B. W. J. FOX,
Notary Public, Kings Co., N. Y.

Certificate filed in New York county.

(Endorsed:) United States circuit court, southern district of New York. John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle, plaintiffs, *vs.* The Texas and Pacific Railway Company, defendant. Answer. Rush Taggart, attorney for defendant, 195 Broadway, New York. U. S. circuit court. Filed Nov. 19, 1895. John A. Shields, clerk.

At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Friday, the ninth day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable E. Henry Lacombe, circuit judge.

JOHN HENRY CLAYTON ET AL.
vs.
TEXAS AND PACIFIC RAILWAY COMPANY.

Now come the plaintiffs, by Treadwell Cleveland, Esq.,
11a their attorney, and move the trial of this cause. Likewise comes the defendant, by Rush Taggart, Esq., its attorney. Thereupon a jury is impaneled and the cause proceeds to trial. After hearing the evidence for the respective parties and the argument of counsel, the jury on the 14th day of April, 1897, by direction of the court say that they find a verdict for the plaintiff for the sum of fourteen thousand and sixty-eight dollars ($14,068), and so say they all.

Thereupon the court grants the defendant a stay of 60 days after entry of judgment within which to make and serve a case, with leave to turn the same into a bill of exceptions.

(An extract from the minutes.)

JOHN A. SHIELDS, *Clerk.*

United States Circuit Court, Southern District of New York.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANderson Earle
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Judgment, Dated April 22, 1897.

The issues in this action having on April 12, 1897, duly come on to be tried before Honorable E. Henry Lacombe, United States circuit judge, and a jury, and the trial thereof having duly pro-
12*a* ceeded on the said twelfth day of April, 1897, and the days subsequent thereto, and the jury having on the fourteenth day of April, 1897, by direction of the court, duly rendered a verdict in favor of the plaintiffs against the defendant for the sum of fourteen thousand and sixty-eight dollars, and the plaintiffs' costs and disbursements herein having been duly adjusted in the sum in that behalf hereinafter mentioned:

Now, on motion of Evarts, Choate & Beaman, attorneys for the plaintiffs,

It is ordered and adjudged, that the plaintiffs, John Henry Clayton, Nicholas Roberts and Charles Anderson Earle, recover from the defendant, The Texas and Pacific Railway Company, the sum of fourteen thousand and sixty-eight dollars, the amount of said verdict, and the further sum of seven hundred and thirteen and $\frac{55}{100}$ dollars, the plaintiffs' cost and disbursements as adjusted, amounting in all to the sum of fourteen thousand seven hundred and eighty-one $\frac{55}{100}$ dollars ($14,781.55), and that the plaintiffs have execution against the defendant therefor.

Judgment signed and entered this 22d day of April, 1897,

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) United States circuit court, southern district of New York. John Henry Clayton, Nicholas Roberts, & Charles Anderson Earle against The Texas & Pacific Railway Company. Judgment, dated April 22, 1897. Evarts, Choate & Beaman, 52 Wall street, New York city, attorneys for plaintiffs. U. S. circuit court. Filed Apr. 22, 1897, 12.29 p. m. John A. Shields, clerk.

1 United States Circuit Court for the Southern District of New York.

JOHN CLAYTON ET AL.
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Bill of Exceptions.

Be it remembered that at a regular term of this court held on the first Monday of April, 1897, to wit, on the 9th day of April, 1897, the issues in this cause came on for trial before the Hon. E. Henry Lacombe, circuit judge, and a jury duly impaneled and sworn, and

thereupon the plaintiff-, through *his* counsel, having opened *his* case to the jury to maintain the issues on *his* part, called as a witness MARVELLE C. WEBBER, who testified as follows:

By Mr. CLEVELAND:

Q. You are a lawyer and an assistant of the attorneys for the plaintiffs?

A. I am.

Q. Are you familiar with the details connected with the institution of this suit and the motion and plea to the jurisdiction made by the defendant?

A. I am.

Q. Will you please state the incidents connected with the
2 institution of this suit and what steps were taken by the defendant before the motion to the jurisdiction was made?

A. The summons and complaint was served on Charles E. Satterlee, secretary and treasurer of the defendant, at No. 195 Broadway, New York city, on August 16, 1895. On August 16, 1895, *the* plaintiffs' attorneys received from Winslow S. Pierce, Esq., an attorney and counsellor at law, with offices at 195 Broadway, in the city of New York, a letter, which reads as follows:

"The Texas and Pacific Railway Company, legal department.

"John F. Dillon, general counsel. Winslow S. Pierce, general attorney.

"195 BROADWAY, NEW YORK, *August* 16, 1895.

"Messrs. Evarts, Choate & Beaman, 52 Wall street, N. Y. city.

"GENTLEMEN: Will you have the kindness to let me have two additional copies of the complaint in each of the following cases, namely: John Henry Clayton and others *vs.* The Texas and Pacific Railway Company, and Arthur Bower Forwood *vs.* The Texas and Pecific Railway Co., and very much oblige,

"Yours very truly,

"WINSLOW S. PIERCE."

We were informed by the representative of Mr. Pierce's office that these extra copies were necessary to be sent to the southern offices of the company to obtain the information required for preparing the answers. Extra copies were furnished as requested. On or about September 3, 1895, Mr. Pierce applied for an extension of time to answer, demur or otherwise move in this action. The stipulation was prepared by his office and contained the full title of the said
action and was enclosed in a cover endorsed: "U. S. circuit
3 court, southern district of New York. Def't stipulation extending def't's time to answer, &c. Winslow S. Pierce, att'y for def't, 195 Broadway, N. Y.; John F. Dillon, counsel."

We were unwilling at first to grant such extension, but finally did so on the express understanding that the said answer should be served in sufficient time to allow the said action to be noticed for

trial for the October term. The reason why this condition was not written into the stipulation was because Mr. Pierce was absent, and his representative, Mr. Duncan, said he did not like to change the form of the stipulation as prepared by him, but gave assurances that said condition would be complied with. We heard nothing contrary to said understanding until an application was made to us on or about September 28 by Mr. Taggart for a further extension of time. We were informed that Mr. Taggart had been retained to defend the suits. We refused to grant such an extension of time. Thereupon Mr. Taggart applied to Judge Benedict, on an affidavit entitled in said action stating that he was the attorney of the defendant therein, for an order extending the time to answer, plead, demur or otherwise move, thirty days from September 30, 1895. The said motion papers were enclosed in a cover endorsed, "U. S. circuit court. William H. Cornforth and Beaumont Taylor and other cases (of which the Clayton case was one), plaintiffs, against The Texas and Pacific Railway Co., defendant. Rush Taggart, attorney for defendant, 195 Broadway, N. Y.; John F. Dillon, counsel."

The moving affidavit stated that the said attorney was ready and prepared to serve a motion to set aside the service of the summons and complaint and except to the jurisdiction of the court over the defendant on the ground that it is not an inhabitant of this district, and that the plaintiffs are either aliens or inhabitants of other than this district. The said attorney further stated in said affidavit that

4 he desired such an extension of time in order to enable the said motion to be submitted to the court and decided, and because, if required to answer, the defendant would need that time to obtain information as to the facts in the States of Texas and Louisiana.

Instead of making such motion at once, the defendant's attorney waited until the extension of time to plead granted by us was about to expire and then applied for further time, and, being refused, applied to the court and obtained an extension of time beyond the date on which notices of trial for the October term were required to be served. On such application Judge Benedict granted an extension of time for ten days from September 30, 1895. The motion papers to set aside the service of said summons and complaint were not served until late in the afternoon of October 4th, 1895, four days after the date of the application for said order.

Q. Have you examined the acts of Congress by which the defendant was incorporated?

A. I have.

Q. Please state the provisions of said act.

A. The Texas and Pacific Railway Company, the defendant, was incorporated by an act of Congress approved March 3, 1871, (Statutes at Large, vol. 16, p. 573.) Such act provides that certain persons, set forth in the said act, "and all such persons as shall or may be associated with them and their successors, are hereby created a body politic and corporate in fact and in law by the name, style and title of the Texas and Pacific Railroad Company, and by that

name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States, and may make and use a common seal, and said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, from a point at or near Marshall, county of Harrison, State of Texas," to certain other points or places in Texas, New Mexico, Arizona and California.

Section 2 provides that the persons named in the first section of the act should constitute a board of commissioners to be known as the Texas and Pacific railroad commissioners, who should meet in the city of New York within ninety days after the passage of the act at a time to be designated in a notice to be published for two weeks in at least one daily newspaper in New York, New Orleans and Washington, for the purpose of organizing such company. It was further provided that the annual meetings of stockholders should take place as provided for in the by-laws.

Q. Where are the annual meetings of the stockholders, the annual meetings of the directors, and the meetings of the executive committee of the defendant held ?

A. The annual meeting of the stockholders, the annual meeting of the board of directors, and the meetings of the executive committee of the board are held in the city of New York.

Q. You may continue, Mr. Webber.

A. Section 3 of the act of incorporation provides for fixing the amount of the capital stock, and when so fixed that it should never be increased except by consent of Congress, and that assessments upon such stock should only be made by a majority vote of the whole number of directors at a regular meeting, and such assessment should be paid at the expiration of thirty days after a notice given in one newspaper in each of the cities of Washington, Philadelphia, New York, and New Orleans.

Section 13 provides that the president of the company shall annually, by the first of July, make a report and file it with the Secretary of the Interior, which report shall be in writing, submitting the financial situation of the company, the amount of money received and expended and the number of miles of road constructed in each year, the name and residences of the stockholders and of the directors and other officers of the company, the amount of stock subscribed and the amount annually paid in, and a description of the lines of road surveyed and fixed upon for construction; the amount received from passengers; statement of expenses of said road and its fixtures and a true statement of the indebtedness of said company and the various kinds thereof.

Section 17 provides that certain parts of the lines should be constructed within certain periods of time, and upon failure to so complete it Congress might adopt such measures as it should deem necessary and proper to secure a speedy completion.

Section 19 declares the railroad to be a military and post road.

This act was amended by an act of Congress approved May 2,

1872. By that act the name of the company was changed to "The Texas and Pacific Railway Company."

Q. Was the defendant incorporated under the laws of Texas?

A. The defendant was never incorporated by the laws of the State of Texas, and by the laws of such State was granted only certain rights and privileges; but in all of said laws the legislature expressly recognized, and so recites in the acts, that the said railway company is a corporation created by the laws of the Congress of the United States.

The first act is that of 1871, chapter 272, passed May 24, 1871, entitled "An act to encourage the speedy construction of a railway through the State of Texas to the Pacific ocean."

This act recites that the State of Texas had theretofore incorporated three different companies with power to construct a railway from the eastern boundary of the State to El Paso on the Rio Grande, viz., the Southern Pacific Railroad Co., the Memphis, El Paso and Pacific Railroad Co., and the Southern Trans-Continental Railway Co.; and enacts (section I) that the State of Texas binds
7 itself to donate to the Southern Pacific Railroad Co. and the Southern Trans-Continental Railway Co., heretofore chartered by the State of Texas, bonds of the State of Texas to the amount of $6,000,000, on certain specified conditions being complied with for the purpose of completing a line of railroad to the Pacific ocean.

Section 11 provides that all the rights, benefits and privileges granted and intended to be secured by this act of the Southern Pacific Railroad Company and to the Southern Trans-Continental Railway Company should pass to and vest in the Texas and Pacific Railway Company, recited to be "a corporation created by and under the laws of the United States by an act of Congress approved March 3, A. D. 1871," whenever said Southern Pacific Railroad Company and said Southern Trans Continental Railway Company should become consolidated with the said Texas and Pacific Railroad Company; and authority was thereby given to the said Southern Pacific Railroad Company and the said Southern Trans-Continental Railway Company and the said Texas and Pacific Railroad Company to consolidate on such lawful terms and conditions as might be agreed upon between the said companies.

The next act is that of November 25, 1871, chapter 82, being an act amendatory of and supplemental to the above act. It empowers (sec. 5) the Southern Pacific Railroad Company and the Southern Trans Continental Railway Company to conform the gauge of their several roads to such gauge as may be adopted by the Texas and Pacific Railroad Company, recited to have been chartered "under act of the Congress of the United States, March 3, 1871."

The act, chapter 108, Special Laws, 1873, after reciting the authority theretofore given to the Southern Trans-Continental Railway Company and the Southern Pacific R. R. Co. to become consolidated with the Texas and Pacific Railroad Company, stated in said act to be "an incorporation created by an act of Congress of the United States," and that such consolidation had been
8 effected, and that in order to avoid a future difference of opinion as to the amount of lands to which the said Texas

and Pacific Railroad Co. might be entitled by reason of such consolidation, as the assignee and successor of the said Southern Pacific R. R. Co. and the Southern Trans-Continental Railway Co. enacts (section 1) "that the Texas and Pacific Railway Company, a corporation created by an act of Congress of the United States as the successor of the Southern Trans-Continental R. R. Co." * * * and "of the Southern Pacific Railway Co." should construct its road to certain places within a certain time.

Section 2 granted lands to the Texas and Pacific Railway Company.

Section 9 provided that the grants, donations, reservations were made "to the said Texas and Pacific Railway Co., a corporation created by an act of the Congress of the United States, approved March 3, 1871, as the assignee and successor of the Southern Trans-Continental and Southern Pacific R. R. Co.," with the intent that they should be in full satisfaction of claims under the said acts of May 24, 1871, and November 25, 1871, and further provided that the said Texas and Pacific Railway Company should be subject to such general laws as might be enacted by the legislature applicable to other railroads constructed within the State of Texas.

Q. Have you examined the annual reports of the defendant?

A. I have obtained a copy of the annual report of the defendant for the year ending December 31, 1894, from the Secretary of the Interior of the United States.

Q. State what you found in the report for that year.

A. The report begins as follows:

"OFFICE TEXAS AND PACIFIC RAILWAY COMPANY,
"NEW YORK, *March 1st*, 1894.

"To the stockholders of the Texas and Pacific Railway Co.:

"The following report of the operations of the Texas and Pacific Railway Company for the fiscal year ending December 31st, 1894, is respectfully submitted by your board of directors:"

It appears by such report that the interest on the bonds of said company amounted to $1,279,490 for the year 1894. At page 47 of said report is a statement of the general expenses of the Texas and Pacific Railway Company for the year 1894. This statement contains an item as follows:

"Expense—New York office, $17,607.38."

On page 3 of said report is a list of the officers and directors of the said company.

The directors elected March 20, 1895, are given as follows:

"Sam'l Sloan, New York.
"R. M. Galloway, New York.
"John T. Terry, New York.
"Samuel Thomas, New York.
"Russell Sage, New York.
"George J. Gould, New York.
"Thomas T. Eckert, New York.

" John G. Moore, New York.
" C. M. McGhee, New York.
" Isaac J. Wister, Philadelphia.
" J. N. Hutchinson, Philadelphia.
" John P. Munn, New York.
" Milton H. Smith, Louisville.
" S. H. H. Clarke, St. Louis.
" A. L. Hopkins, New York.
" Howard Gould, New York.
" C. E. Satterlee, New York."

The following is a partial list of the officers as given in said report:

" George J. Gould, president.
" S. H. H. Clark, vice-president.
" C. E. Satterlee, secretary and treasurer.
" L. S. Thorne, third vice-president and general manager.

* * * * * * *

10 " John F. Dillon, general counsel, New York.
" Winslow S. Pierce, general attorney, New York."

It appears by the said report that the annual meeting of the said company is held on the third Wednesday in March in the city of New York; that the registrar of stock is the Mercantile Trust Company of New York city; the trustees of bonds, the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, Penn., and the Mercantile Trust Company of the city of New York. The directors elected March 20, 1895, were as follows: Samuel Sloan, R. M. Galloway, John T. Terry, Samuel Thomas, George J. Gould, Thomas T. Eckert, Russell Sage, C. M. McGhee, C. E. Satterlee, A. L. Hopkins, John G. Moore, Howard Gould, John P. Munn, all residing in New York city, N. Y.; Isaac J. Wistar, J. N. Hutchinson, residing in Philadelphia, Pa.; Milton H. Smith, Louisville, Ky.; S. H. H. Clark, residing in St. Louis, Mo. The president of said company is George J. Gould, who resides in the city of New York; the vice-president is S. H. H. Clark, who resides in St. Louis, Mo., and the secretary and treasurer is C. E. Satterlee, who resides in the city of New York, N. Y. The interest on the first-mortgage bonds is payable in New York city at the Mercantile Trust Company and also in Philadelphia. The interest on the second-mortgage bonds is also payable in the city of New York. On page 4 of the said annual report it is stated that the first mortgage bonds amount to $25,000,000 and the second-mortgage bonds to the same amount, the whole amount of the bonded debt being $50,000,000, all the principal whereof is, I believe, payable at the city of New York.

Q. Have you examined Poor's Manual of Railroads for statements concerning the defendant?

A. I have. The following facts appear in Poor's Manual of Railroads for the years hereinafter mentioned:

The only office of the said Texas and Pacific Railway Company in the years 1871, 1872, 1873, 1874 and 1875 was in the city of New York.

11 In 1876 its principal office was in Marshall, Texas, and its executive office in Philadelphia.

In 1877 and 1878 its general office was in said Marshall, Texas; its executive office in Philadelphia and its transfer agency in the city of New York.

In 1879 its principal office was in Marshall and the executive office in Philadelphia.

In 1880 and 1881 its general office was in Philadelphia, its principal office in Marshall and the transfer agency in the city of New York.

In 1882, 1883 and 1884 its general office was at 195 Broadway in the city of New York, the same place where it now has its New York office, and its principal office in St. Louis.

In 1885 its general office was at 195 Broadway in the city of New York, and its executive office in St. Louis.

In 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893 and 1894 its general office was at 195 Broadway in the city of New York, and its executive offices in Dallas, Texas.

Q. Have you read the resolution adopted in the city of New York on July 15, 1889, by the executive committee of the board of directors of the defendant, in reference to the act of the legislature of Texas requiring railroad companies to maintain their general offices in that State, and, if so, state what you know about it?

A. It sets forth that, while it was the purpose of the company to comply with that law in letter and spirit, nevertheless this was done "without waiving any of its chartered or legal rights in the premises," and "out of respect to the legislative expression of the State of Texas."

Q. Do you know whether the annual meeting of the stockholders and of the board of directors, as well as the meetings of the executive committee, have ever been held in the State of Texas?

12 A. They have not, but have been held during the greater period of the existence of the defendant, where they are held now, in the city of New York.

WILLIAM R. MONTGOMERY, a witness in behalf of plaintiffs, having been duly sworn, testified:

By Mr. CLEVELAND:

Q. Are you employed by the plaintiffs' attorneys?

A. I am.

Q. Have you ever been in the New York offices of the Texas and Pacific Railway Company, and, if so, state what you observed there.

A. On or about the 9th day of October, 1895, I went to No. 321 Broadway, in the city of New York, where the Texas and Pacific Railway Company maintains a freight agency. There is a sign over the doorway at said place with the inscription "Texas and Pacific railway," and a similar inscription appears on the window fronting on Broadway. I entered said office and inquired for the freight agent of the Texas and Pacific Railway Company and was

referred to a person sitting at a desk in the office, to whom I applied and asked if that was the freight agency of the Texas and Pacific Railway Company. He replied that it was. I saw a sign over a doorway leading into an inner room of the office bearing the inscription, "general passenger agent, Texas and Pacific." I inquired if the company shipped freight from this city to points in Texas and the agent replied that it did. I have been several times in the office of the Texas and Pacific Railway Company at No. 195 Broadway in the city of New York. There is a sign in the hallway in front of the door bearing the inscription, "Texas Pacific Railway Co." The door bears the inscription, "Texas and Pacific Railway Co., transfer office." I saw at least two large rooms which were occupied by the said company. One of the rooms is divided by a partition similar to those used in banks for separating the public from its officers and employees. Behind this partition were
13 several desks. An opening, or window in said partition, allowing communication with a person stationed there, bore the inscription, "cashier." The other office was occupied by Mr. Charles E. Slatterlee, the secretary and treasurer of said company. I served the said treasurer with summons and complaint in this action.

JOHN D. KERNAN, a witness in behalf of plaintiffs, being duly sworn, testified:

By Mr. CLEVELAND:

Q. You are a lawyer, Mr. Kernan?

A. I am.

Q. Were you at one time counsel for the Interstate Commerce Commission in an action against the Texas and Pacific Railway Company?

A. I was.

Q. Please state what contention was made in that action by the railway company.

A. It was claimed by the Texas and Pacific Railway Company that the court did not have jurisdiction over it in the action on the ground that the principal office was not within the southern district of New York.

Q. What answer did you make to that?

A. I filed an affidavit stating facts to show that its principal office was within this district.

Q. Will you please state what facts you know upon that point?

A. The United States Statutes incorporating the road (16 Stat. at Large, p. 574, &c., and 17 do., p. 59) have no provision as to where the principal office shall be, and provides that the first meeting to organize, &c., shall be held in New York city. The New York office is the place where the annual meeting of stockholders for the election of directors is, and for many years past, has been held; said meetings are held bi-annually; at the election there held by stockholders for the purpose aforesaid, in March, 1889, and at the meet-

ing of stockholders so held in March, 1891, there were elected
14 as directors of the company for two years, fifteen directors, ten of whom were at all times residents of the city of New York. Substantially all of the meetings of the board of directors for the transaction of the business relating to the company are held at its office in the city of New York. In the absence of the board of directors powers of the board are, under the by-laws of the company, vested in an executive committee of five members all of whom are directors residing in the city of New York, as aforesaid, and the meetings of said executive committee are held, as aforesaid, at the office of the company in the city of New York; that no meeting of the stockholders or of the board of directors or of the executive committee are held in Texas except the biennial stockholders' meeting, where directors are elected, in the city of New York, is adjourned to meet in Texas; that said adjourned meeting in Texas is merely formal and no business of consequence is done thereat. Only one meeting of the board of directors was held in Texas in 1891, and that was an adjourned meeting held at the same time that the adjourned stockholders' meeting was held. No stockholders, substantially, were present at said adjourned meeting in Texas, except by proxy, and no majority or quorum of the board of directors was present. During the two years 1890 and 1891 no meeting of the board of directors or of the executive committee was held in Texas or otherwise than at the New York office, where the majority of the board or of the executive committee were present or transacted business. The object of holding an adjourned meeting of stockholders and of the board of *the* directors in Texas, as aforesaid, is to comply with the statutes of Texas, which require the board to meet in such State at least once a year, &c.

Sayles' Texas Civ. St., sec. 4115.

During the time that the executive office of the company was at Philadelphia, Pennsylvania, Thomas A. Scott of Philadelphia, Pennsylvania, was president of the company. During the
15 time that the principal office of address was at St. Louis the first, second and third vice-presidents of the company all resided there. Since 1887 the president and first vice-president has resided in New York, and have had their office at said 195 Broadway. It is to be observed that a distinction between the general or principal office (singular) and the general or executive offices (plural) has always been observed. The said New York office in 1892 was the office of Jay Gould, president, of George J. Gould, first vice-president, and of C. E. Satterlee, the secretary and treasurer of the company; the annual reports of the condition and operations of the company are prepared at said New York office, and there dated and issued to the stockholders under the hand of the president of the company. The statement in said reports for 1888, 1889 and 1890, as to the offices of the company, is as follows:

"General offices, Dallas, Texas; New York office, 195 Broadway, N. Y."

The books of minutes of both stockholders' and directors' meetings

are kept by the secretary and treasurer of the company at the said New York office, and all certificates of stock are there issued. Weekly reports of the receipts and disbursements are sent to the secretary and treasurer at the said New York office, and there kept by him in appropriate books. In addition thereto, monthly reports thereof are sent to the president at the said New York office. It is true that the general or executive offices of the company are at Dallas, Texas. At such offices the orders and directions of the president, and in his absence the first vice-president, and of the board of directors and the executive committee of the company, are carried out by the different executive departments there located, and the books relating to such operations so carried out are there kept, such offices being, in a word, the offices of the different executive departments charged with the duty of carrying on operations of the road subject to the direction and control of the president, first vice-president, board of
16 directors and executive committee, located in the city of New York. The act of the Texas legislature of March 27, 1889, requiring railroads to keep and maintain their general offices, shops, &c., within the State of Texas, on its line, and to keep there certain officers, to wit; president or vice-president, &c., or some one to perform the duties thereof—obviously used the words "general offices" in the sense of executive offices, as aforesaid.

In pursuance thereof, the defendant, under the resolution contained in the moving affidavit, put into the office of third vice-president John A. Grant, theretofore and since the general manager of the company, located at Dallas, Texas. An assistant secretary and treasurer was also appointed and has since so acted at Dallas, Texas. No other changes were made or had taken place up to the time I made my affidavit in March, 1892, in the interstate commerce case, in reference to the offices of the company under the said act of March 27, 1889. All of the other executive agents of the company, as auditor, &c., had long prior thereto been, as is usual and necessary, located in Texas, where the plant of the company is situated and operated.

The foregoing facts were stated by me in the said affidavit on information and belief and were derived from the statutes of the United States and Texas, from the printed reports issued to stockholders by the president as aforesaid, and from an interview held with Mr. Satterlee, the secretary and treasurer of the company, at which the counsel of the company was present. At the same interview Mr. Satterlee admitted that Poor's Manual is a leading authority for information as to railroad facts and statistics published in the United States. In the report for 1891 it is stated as follows: "Executive offices, Dallas, Texas; general office, 195 Broadway, N. Y." The said reports are based upon information furnished to those who issue said manual by the railroads themselves, either in the form of blanks furnished to the railroad companies and filled up by them,
17 or taken from the annual reports made to stockholders by the presidents of such companies. At the said New York office the said Poor's Manual is subscribed for and taken by the company. At said interview with the secretary and treasurer of

the company—Mr. Satterlee—I called his attention to the statement made in Poor's Manual for 1891, and in reply thereto Mr. Satterlee said that he had but recently noticed that statement contained in Poor's Manual for 1891, and that it was wrong and a mistake, and that he could not understand how it had occurred. Upon inquiry at the office of Poor's Manual I was advised that they had followed since 1888 their publication as to the question of offices issued prior to 1888; also that in one report only made by the company since 1883, had it been stated that the principal office was at Dallas, Texas, and that Poor had not used the same. The defendant as a subscriber to said Poor's Manual, has permitted and allowed the statement to be therein made that the executive offices of the company are at Dallas, Texas, while its central office is in New York, as aforesaid. Beginning in 1871, when the company was organized, the following are the statements to be found in said Poor's Manual as to the offices of the company:

Date.

1871–'2. Principal office and address, corner Warren and West streets, New York.
1872–'3. Principal office and address, 20 Exchange place, New York.
1873–'4. Principal office and address, 20 Exchange place, New York.
1874–'5. Principal office and address, 20 Exchange place, New York.
1875–'6. Principal office and address, 20 Exchange place, New York.
1876–'7. Principal office and address, Marshall, Texas. Executive office, 275 South street, Philadelphia, Penn.
18 1877–'8. General offices, Marshall, Texas. Executive office, Philadelphia, Penn. New York transfer office, No. 50 Exchange place, New York city.
1878. Same.
1879. Principal office and address, Marshall, Texas. Executive office, 275 South Fourth street, Philadelphia, Pa.
1880. Same. Transfer office, Farmers' Loan and Trust Company, New York.
1881. Same.
1882. Principal office and address, St. Louis, Mo. General offices, 195 Broadway, New York.
1883. Same.
1884. Same.
1885. Executive offices, St. Louis, Mo.
1885. General office, 195 Broadway, New York.
1886. Receiver, Brown & Co., Dallas, Texas. Jay Gould, president, New York. Executive offices, Dallas, Texas. General office, 195 Broadway, New York.
1887. Same.
1888. Same.
1889. Same.
1890. Same.
1891. Same.

19 The plaintiff also then offered in evidence the affidavit of John Henry Clayton, and the stipulation by the attorney for

the defendant to accept said affidavit as proof of the allegations contained in the paragraph numbered first of the complaint. The stipulation was marked "Plaintiff's Exhibit A," and was as follows:

United States Circuit Court, Southern District of New York.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES Anderson Earle
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

It is hereby stipulated and agreed that the original affidavits, of which the annexed are copies, shall be accepted by the defendant as proof of the allegations contained in the paragraph numbered "First" of the complaint in the above-entitled actions; and further proof of said paragraphs is hereby waived in each of said actions.

Dated New York, February 24th, 1897.

(Signed) RUSH TAGGART,
Attorney for Defendant.

The affidavit of John Henry Clayton was marked "Plaintiff's Exhibit A 1," and was as follows:

20 United States Circuit Court, Southern District of New York.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES Anderson Earle
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

KINGDOM OF GREAT BRITAIN, } *ss:*
City of Liverpool, }

I, John Henry Clayton, of the city of Liverpool, England, being duly sworn, depose and say as follows:

That from the 1st day of October, 1894, to and including the 9th day of August, 1895, I was a member of the firm of Newell & Clayton. During all of said times the said firm was composed of John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle, as partners, doing business as cotton brokers in the said city of Liverpool, England, and during all of said times said persons were, and are now, subjects of the Queen of Great Britain and Ireland. The plaintiffs are now partners as aforesaid.

JOHN H. CLAYTON.

Sworn to before me this 1st day of December, 1896.

JOHN DICKINSON,
Notary Public, Liverpool.

21 To all to whom these presents shall come, I, John Dickinson, notary public by royal authority, duly admitted and sworn, residing and practising in the city of Liverpool, in England, do hereby certify that, on the 1st day of December, 1896, personally

appeared before me John Henry Clayton, the within-named deponent, who did depose to the truth of the within-written affidavit, and I further certify that the signature "John H. Clayton" is the true and original signature of the said deponent.

In testimony whereof, I have hereunto set my hand and affixed my seal notarial the 2d day of December, 1896,

JOHN DICKINSON,

[SEAL.] *Notary Public, Liverpool.*

I, the undersigned, consul of the United States of America for the port of Liverpool and its dependencies, do certify and make known, to whom these presents shall come, that the signature John Dickinson to the annexed certificate subscribed is genuine; that the said John Dickinson is a notary public of respectability, doing business in Liverpool, and that to the said certificate, as signed, in my opinion, full faith and credit are due.

Given under my hand and seal of office, at Liverpool,
[SEAL.] this 2d day of Dec., and year of our Lord one thousand eight hundred and ninety-six.

JAMES E. NEAL,
U. S. Consul.

22 The plaintiff thereupon offered in evidence four bills of lading hereto attached, made a part hereof and marked "B. L. 35," "B. L. 61," "B. L. 28" and "B. L. 29" (Exhibits B. L. 1 to 4 printed *post*, at pp. 131 *et seq.*).

The plaintiff also offered stipulation as to the method of proof of value of cotton, marked "Exhibit C" and made part hereof (printed *post*, pp. 143 *et seq.*).

The plaintiff further offered in evidence four invoices of the cotton referred to and covered in said bills of lading, which were received in evidence and marked "Exhibits D 1," "D 2," "D 3" and "D 4," which are made part of this bill of exceptions respectively (printed *post*, pp. 145 *et seq.*).

Thereupon the plaintiff called as a witness EDWARD R. POWERS, who testified as follows:

I am superintendent of the New York cotton exchange, and have been since the 1st of October, 1872. I have looked up the price of cotton at New Orleans at different dates in October, 1894, of middling and fancy middling and good middling, and the various grades mentioned on the paper which is shown me. As they call it at Liverpool, "fully" middling is not used in this country. It is called "strict" middling; that is, it is a grade between middling and good middling. On the 23d of October, 1894, middling was five and five-sixteenths cents per pound. Good middling, five and five-eighths cents per pound, and strict middling, five and fifteen thirty-seconds. There is some allowance for staples in those prices, an allowance from an eighth to three-sixteenths. There is an eighth of a penny, which we would call a quarter of a cent, and from a sixteenth to an eighth. They allow a thirty-second, which we would call an eighth

of a cent. We figure it in that way. The various grades of cotton of which I have so far given the prices, which I have prepared at different dates, have been taken by me from the invoices which are now shown me marked "D 1," "D 2," "D 3" and "D 4." The price of middling I have given at five and five-sixteenths on the 23d of October, 1894; adding a quarter of a cent for staple
23 would make it five and nine-sixteenths; that was the price of New Orleans middling on October 23, 1894. I have given the price of good middling at New Orleans on the same date. I have given as five and five-eighths, adding an eighth for staple makes it five and six-eighths, as the price at New Orleans for good middling on October 23, 1894. I have given the price of strict middling on October 23, 1894, at New Orleans, as five and fifteen thirty-seconds; adding one-eighth for staple would give five and nineteen thirty-seconds as the price on that date at New Orleans for what is called "strict" middling. On October 10th, 1894, the price at New Orleans for strict good middling was six and one-quarter cents; add an eighth for staple would make six and three-eighths; add a quarter for staple would make six and one-half. Good middling on the same date was six cents, adding a quarter for staple makes six and a quarter. On October 15th, the New Orleans price for good middling was five and thirteen-sixteenths; adding a quarter for staple would make it five and seventeen-sixteenths; of strict middling, five and five-eighths, adding a quarter, five and six-eighths; and adding an eighth to the staple of good middling price, that is, adding an eighth to five and thirteen-sixteenths would give five and fifteen-sixteenths for good middling at New Orleans on October 15th, for which an eighth was added for staple.

Cross-examination by Mr. TAGGART:

These quotations are taken from the New Orleans circular of those dates. There are several quotations made daily. It is not the highest or lowest; there is one grade, for instance, middling quoted as middling, but nothing but that. In New York we have the middling takes the grade above and below. I suppose they have the same thing there. I could not answer as to whether there was any fluctuation in price on the New Orleans market on any of those days in any of those grades. There might have been some
24 little fluctuation, but not much in the ordinary grade, because that is a special quotation sent out to the world. I would have to send down to New Orleans to see whether or not there was any variation in the price between morning and evening quotations, for instance, on the 1st of October. My records do not show that. We have what they call their official quotation of prices on the New Orleans market; that is the closing quotation in each case; it is the only quotation that is made there. It is the only quotation that is sent to me and I am positive it is the only quotation that is made there. I think that, on spots, there is no regular quotation made at the morning call—the opening quotation.

MARVELLE C. WEBBER, was then recalled on behalf of the plaintiff, and testified as follows:

I am a lawyer and one of the assistants of the plaintiffs' attorneys. I have made some calculations in relation to the price of cotton involved in this case. I have taken the prices as stated by Mr. Powers for the different grades of cotton, and, taking the invoices to get the weight. I have multiplied the value of the cotton of each grade per pound by the weight so as to ascertain what the cotton involved in this suit would amount to by a matter of multiplication. On the bill of lading No. 35 there were 118 bales of cotton marked "T. C. U. P." that were burned. Mr. Powers has stated that the price of good middlings on that day, the day of the date of the bill of lading, was five and seventeen sixteenths cents per pound. Now according to the stipulation as to the weight of the cotton each bale of cotton on that bill of lading would weigh five hundred and thirty-three and twenty-five one-hundredths pounds. One hundred and eighteen bales then would weigh sixty-two thousand nine hundred and twenty-three pounds. That, multiplied by five and seventeen-sixteenths cents per pound, will amount to $3,485.47. But according to the stipulation there is to be deducted from that seventy-five cents per hundred pounds of freight; that amounts to
25 $471.92, and making the deduction, the value of the one hundred and eighteen bales marked "T. C. U. P." at New Orleans on the date of the bill of lading, $3,013.55. I have gone through a similar calculation as to each lot of cotton mentioned on each of the four bills of lading involved in this case. Going on with the bill of lading No. 35, sixteen bales marked "S. A. B. O." at five and six-eighths cents would amount to $490.59, less freight $3.67, leaves $486.92, value of the cotton in New Orleans at that date. Fifty-one bales of cotton marked "O. X. F. O." at five and fifteen-sixteenths cents is $1,362.24, less freight $203.97, leaves $1,158.27, the value of the cotton in New Orleans at that date. All of those figures are given on the statement which I have before me; they are all figured out on this paper.

Mr. CLEVELAND: Will you consent to receive that statement as his evidence?

Mr. TAGGART: Yes.

The total on this bill of lading No. 35 is $5,115.19. On bill of lading 29 the total is $3,035.39. On bill of lading 61, $1,973.49. On bill of lading 28, $2,657.28. Making a total for the four bills of lading of $12,781.35.

Cross-examination by Mr. TAGGART:

There were eight bales marked "T. C. U. P." that were not burned. They are on one bill of lading and are one invoice. I don't remember the number.

By the COURT:

Q. T. C. U. P. is on the bill of lading 29 —twelve bales?
A. But those were burned.

Q. One hundred and eighteen?

A. They were burned. On bill of lading 28 there were eight bales T. C. U. P., which we consider are the ones that were carried forward—were not burned.

26 By Mr. TAGGART:

As to how I arrive at that, I do not know positively, of course, that those were the eight bales that were delivered, but on the invoice these eight bales—on invoice dated October 10—these eight bales T. C. U. P. may be found, and the bill of lading that carried forward those bales of cotton is bill of lading No. 28.

By Mr. CLEVELAND:

I mean on which they were shipped. They are also marked "T. C. U. P." The rest of the other marks, "T. C. U. P.," were of a larger sum than eight bales, and, it being the fact that there were eight bales T. C. U. P. that went forward, I considered that it was on this bill of lading 28. Of course, it is not absolutely certain that that was the eight bales.

By Mr. TAGGART:

I did not understand that the stipulation provided that in that event the lowest-priced cotton of these particular marks was to be considered the cotton which was delivered, but the lowest price of those particular marks on that invoice, I think. I say that the cotton on this particular invoice, which is of a higher grade and higher price than the 118 bales, was not destroyed. You have the benefit of the better grade in that particular case. I treat the eight T. C. U. P. as delivered. I also treated as delivered 25 bales of the 51 bales marked "O. X. F. O.," which is on bill of lading 61, because the invoice shows that there were other marks "Q. B. B. E. and J. A. X. O.," and they appear on bill of lading 61. Of the two lots of O. X. F. O. 51, I took as delivered the one which is in bill of lading No. 61. The invoice is dated October 24. My invoice shows by marks that the cotton O. X. F. O. burned as on invoice dated October 24. I am taking the marks on my invoice as to the particular cotton that was burned. I cannot tell whether they are different dates and different prices.

27 By Mr. CLEVELAND:

The price at which I have taken the 25 bales of the 51 bales is the value of good middling cotton on October 23d at New Orleans.

By Mr. TAGGART:

I find the total amount by my calculations is $12,781.35.

Mr. TAGGART: We have not time to verify this.

Mr. CLEVELAND: If it be not correct it can be verified hereafter.

Mr. Cleveland offers in evidence the schedule of prices; marked "Exhibit E" (not printed. See stipulation, p. 155 *post*).

Thereupon the plaintiffs rested their case, and defendant's counsel

then moved the court to direct the jury to render a verdict for the defendant upon the following grounds:

First. That the plaintiffs' complaint is wholly unproved in its entire scope and meaning. That there was not a variance but an entire failure of proof of the cause of action alleged in the complaint.

Second. That the allegations of the complaint are that these bales of cotton were, on or about the 12th day of November, 1894, wholly destroyed by fire at Westwego, Louisiana, aforesaid, at which time and place the same were in the possession of the defendant in the course of such carriage, and as a common carrier; the answer, admitting that the said cotton was destroyed at Westwego, Louisiana, aforesaid, denies each and every other allegation respecting the possession of said cotton; and that there was no proof of any of the allegations of the complaint in this regard.

The first ground on which I desire to move for a direction is that the plaintiffs' complaint is wholly unproved in its entire scope and meaning. There is not a variance, but an entire failure of proof in this case. The ground upon which that motion is made is this:

28 If you will examine the complaint you will find in paragraphs 3 and 4 allegations to this effect—that in the month of October, 1894, at Bonham, the plaintiffs, through an agent, entered into a contract for the shipment of cotton from Bonham to Liverpool, England. My motion is not only addressed to the question which is there made of an entire contract between Bonham and Liverpool, but as to the nature of the contract which is set forth in the complaint. Your honor will observe that it is an unrestricted contract of shipment of cotton from Bonham to Liverpool; that is to say, a common-law receipt by a carrier of goods, subject to no restrictions whatever. In other words, the contract he sets up in his complaint is a contract by which the defendant undertook, on a common-law obligation as a carrier, without any restrictions whatever, to carry from Bonham, Texas, to the city of Liverpool, England, and an averment subsequently that in the course of such carriage this cotton was lost. The law side of this court, as I understand it, is controlled in its local practice by the provisions of the New York code of civil procedure, which has two sections which apply to a question of this character. If a complaint alleges imperfectly and irregularly facts, and the facts are then introduced, it forms what the court will regard as a variance, and if the other party has been misled thereby the court may make such provisions as to amendments, costs, etc., as the court in its discretion may think proper. But your honor will find alongside of that another section of the code which relates to a total failure of proof, to which I wish to call your honor's attention, and in a case of that character, where an entirely different cause of action is alleged from that which is set out in the proof, no amendment is permissible; there is what is called an entire failure of proof, the complaint being, in its entire scope and meaning, unproven. Now, as Pomeroy, in the section to which I shall call your honor's attention, discusses the question when one contract is set forth in the

complaint, and another contract—an entirely different con-
29 tract—is proved, in that case the complaint is deemed to be entirely unsupported by the testimony, and under authorities in New York and under authorities in Ohio and elsewhere where this question has been considered—precisely this question which is met here has been considered by the courts under codes of procedure similar in character to that of New York—it is held that where a complaint sets forth a common-law liability of a common carrier and the party comes in and proves a different special contract upon a bill of lading, that it falls within the definition, not of a variance, but of a total failure of proof. It is so stated by Baylies in his Trial Practice, citing a number of authorities in New York, and the Ohio supreme court had this question under consideration, in the 2d Ohio State, in Davidson *vs.* Graham, and they held that a complaint alleging a general liability as a common carrier, and the proof being a special bill of lading with special provisions as to liability, exemptions, etc., that it was unproved in its entire scope and meaning. * * *

Now, there is another ground upon which our authorities are being prepared. Your honor has my idea and I will present the authorities on this question. There is another ground upon which on these pleadings as they stand, passing the particular phase of it I now have presented, upon which I shall ask your honor to direct a verdict, and that is this: Construing the contract which the gentleman presents, it is not a contract as has been held over and over again by the Supreme Court of the United States—it is not a contract for the carriage of cotton from Bonham to Liverpool, and, therefore, does not sustain the contention of the plaintiff. Your honor will observe that the gentleman was very careful not to read this bill of lading. In it is this provision: "Upon the following terms and conditions which are fully assented to and accepted by the owner, namely, first that the liability of the Texas and Pacific Railway Company in respect to said cotton and under this
30 contract is limited to its own line of railway, and will cease and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; and in case of any loss, detriment or damage done to or sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of said damage, detriment or loss." Then in the sixth paragraph: "That the said cotton shall be transported from the port of New Orleans to the port of Liverpool, England, by the Elder-Dempster & Co. steamship line, with liberty to ship by any other steamship or steamship line, and upon the delivery of said cotton to said ocean carrier at the aforesaid port, this contract is accomplished, and thereupon and thereafter the said cotton shall be subject to all the terms and conditions expressed in the bill of lading and master's receipt in use by the steamship or steamship company or connecting line by which said cotton may be transported and upon delivering said cotton at the usual place of delivery to the

steamship or steamship line at the port of destination, the responsibility of the carrier shall cease." Now, in Myrick against The Michigan Central Railway Company, 107 U. S., the question was upon a similar bill of lading to this in regard to that recital, and it was held in that case, contrary to the State decisions of Illinois where the contract was make, that a bill of lading similar to this did not make the carriers partners, did not make the first carrier responsible for the entire route, but simply made each carrier responsible in turn for its own particular part of the route. Now, the allegetion of this complaint, and we are to be guided by that, is that these bales of cotton were on — about the 12th day of November, 1894, wholly destroyed by fire at Westwego in the State of Louisiana aforesaid, at which time and place the same were in the posession of the defendant in the course of such carriage and as a common carrier as aforesaid.

31 The answer admits that 467 bales of cotton marked as described in that paragraph were destroyed by fire at Westwego, in the State of Louisiana, on or about the 12th day of November, 1894, but the defendant denies each and every *over* allegation in the said complaint. Now, if this contract was a contract by the Texas and Pacific Railway Company to take this cotton and transport it to the end of its line of railway, and there its responsibility should cease, under the decision which I have called your attention to and other decisions which can be quoted—and there is no proof in this case whether Westwego is on the line of defendant's railway or not, or forms a part of its line of railway—how can it be said that this complaint is sustained in that allegation, which is denied, that the defendant had possession of that cotton as a common carrier at the time of its destruction? It is only upon the theory which the plaintiff evidently has that this bill of lading is a bill of lading binding the Texas and Pacific Railway Company to carry this freight and be responsible for it the entire distance between Bonham, Texas, and Liverpool, England, that this complaint can be said to have any testimony in support of it whatever. But if, as I contend, this bill of lading is to be taken, according to its terms, as a separate liability, first, of the Texas and Pacific to carry to its terminus and there——

The COURT: To carry to New Orleans.

Mr. TAGGART: To carry to New Orleans and there its responsibility shall cease upon delivery to the next carrier, and they have averred in their complaint that at Westwego it was in our possession as a common carrier, which would mean that it was undelivered to the next carrier, and we deny that fact, is not the burden of proof upon them to show that the cotton was at that time and in that place in our possession and under our control as a common carrier? It seems to me that the statement of the proposition is all the argument that is necessary on the subject. There is no question as to

32 the law, as I understand it, upon a bill of lading of this sort.

I cite the 107 U. S. because that comes into my mind at the moment in discussing the matter; there are numberless authorities to that effect; in fact, the uniform holding of the Federal courts—

not of the State courts, though the great bulk of the holdings in the State courts are to the same effect—is that under a contract of this character no joint liability is found on behalf of the first carrier, but simply a separate liability, each for its own line and each in succession, and each discharged upon delivery to the next.

The COURT: Well, I am prepared to dispose of this motion. I think there is a variance between the contract averred in the complaint and the contract proved—in this: that it is averred in the complaint that the defendant undertook, as a common carrier, to carry the goods safely and securely to Liverpool. He did not, in fact, so undertake—he undertook only to carry them safely and securely to the port of New Orleans, and there to deliver them to the ocean carrier, and upon doing so he had fulfilled entirely the obligations of this contract. But that variance is immaterial, if, as a matter of fact, this fire occurred before he had completed his obligations under the contract and had transported the goods to New Orleans and delivered them to the ocean carrier, and upon the proof as it stands the averment in the complaint and the admission in the answer as to the fact that Westwego is the terminus of the line, or at least one terminus of defendant's line, I think there is sufficient proof here to sustain the averment of the complaint, with that variance, which is immaterial in my judgment. I will therefore deny the motion, with exceptions to the defendant and leave to renew at the close of the entire case if you wish to do so.

Thereupon Mr. Masten opened the case for the defendant to the jury, and the defendant called as a witness Charles E. Satter-
33 lee, who testified as follows, an affidavit of the witness being by consent of the parties received in place of his oral testimony:

In the year 1885 the Texas and Pacific Railway Company was placed in the hands of receivers appointed by the circuit courts of the United States for the eastern and western district of Louisiana. That said receivership was continued under proceedings to foreclose several of the mortgages of the said railway company during the years 1886, 1887 and 1888. That the receivers so appointed were John C. Brown and Lionel A. Sheldon. That subsequently to such appointment one of the receivers, Lionel A. Sheldon, resigned, and John C. Brown remained the sole receiver of said railroad and property until the termination of the receivership in October, 1888. That the general offices of said receivers were by them established and maintained throughout the period of said receivership at the city of Dallas, in the State of Texas. That upon the termination of said receivership the railroad and property of the said Texas and Pacific Railway Company was restored to that company, and until the present day the said Texas and Pacific Railway Company has and maintains its general or principal offices in the city of Dallas, in the State of Texas.

That prior to the year 1889 the city of Marshall, Texas, claimed that the Texas and Pacific Railway Company had entered into an engagement or contract with the said city to maintain its offices,

machine shops, etc., in said city of Marshall. That at the time of the appointment of said receivers there was pending in the circuit court of the United States for the eastern district of Texas a suit instituted by the city of Marshall to compel the removal of the offices of the Texas and Pacific Railway Company to said city of Marshall, and a mandatory injunction had been obtained requiring such removal and the maintenance of such offices, machine shops, etc., at the city of Marshall, which said injunction was contin-
34 ued as against said receivers. That the judgment in said suit requiring such removal and maintenance of said offices at Marshall was takes by writ of error to the Supreme Court of the United States. That in the year 1889 the legislature of the State of Texas passed an act, which was approved on the 27th day of March, 1889, requiring railway companies doing business within the State to maintain their general offices therein. Deponent prays that reference to said act may be had on the hearing of this application. That the executive committee of the board of directors of the Texas and Pacific Railway Company, at a meeting held in the city of New York on the 15th day of July, 1889, adopted the following preamble and resolutions:

"Whereas, by an act of the Texas legislature, approved March 27, 1889, all railroad companies chartered by the State of Texas, or owning or operating any line of railway within the State, are required to keep and maintain permanently their general offices, machine shops, round-houses, &c., within the State at certain places, and to keep all books, accounts, &c., at said offices; and

"Whereas, the Texas and Pacific Railway Company, without waiving any of its chartered or legal rights in the premises, is willing, out of respect to the legislative expression of the State of Texas, to consider said act as applicable to it and to act accordingly; therefore,

"Resolved, That — is the purpose of this company fully to comply with said law in letter and spirit, and to that end the general manager of this company be, and is hereby, instructed to immediately make arrangements for the removal of the general offices now at Dallas to Marshall, Texas, and to establish in the said city of Marshall the following offices of this company, viz:

35 "Office of vice-president.
General manager.
Chief engineer.
Secretary and treasurer.
Auditor.
General freight agent.
General passenger agent.
Superintendent of motive power and machinery.
Master of transportation.
Stock and fuel agent.
Claim agent.

"And to have all the books and papers connected therewith kept in said general offices."

That the said Texas and Pacific Railway Company was then in possession of its railroad and property, and the general or principal offices of the said receivers which had been established at Dallas, Texas, as aforesaid, were continued as the general or principal offices of the said railway company. That when said railway company, in pursuance of the resolution hereinbefore recited, was about to remove its said offices to Marshall, Texas, it was prevented from doing so by an injunction obtained by certain citizens of the city of Dallas in one of the local courts restraining and prohibiting such removal. That said injunction was continued upon final hearing, and pending the appeal thereof the Supreme Court of the United States decided the said case of The City of Marshall *vs.* The Texas and Pacific Railway Company adversely to the city of Marshall.

Deponent says that the only office maintained by the defendant railway company in the city of New York consists of two rooms at 195 Broadway in said city. That the president and this deponent, the secretary and treasurer, are the only officers of the said company who reside in the city of New York or who have any office in said city connected with the affairs of the said railway company, except a freight agency at 391 Broadway, in charge of a general
36 eastern agent. Said office of the company in the city of New York is also known as the transfer office of the said railway company, and transfers of the stock of said company may be made at said office.

That the general or principal office of the Texas and Pacific Railway Company located at Dallas, Texas, consists of the offices of the heads of all departments of the said railway company, namely: The general management, covering the operation of the road and transportation of freight and passengers; the accounting department, the legal department for the State, the land and tax department and the supply department, and at said general offices at Dallas, Texas, the offices of the following officers and agents of the said railway company are maintained, namely, the third vice-president, general passenger agent, the auditor, the general freight agent, the general passenger agent, the *the* land and tax commissioner, the assistant secretary and treasurer, master of transportation, general attorney for the State of Texas and other subordinate officers and agents of said railway company, and that all the books, papers and vouchers connected with said offices are kept at said offices and the revenues from the railroad and property of the said railway company are there received and disbursed. That the disbursements of the said railway company in the city of New York are made almost exclusively out of remittances received from the general offices of the company at Dallas and extend only to the payment of interest upon the bonded debt of the said railway company and incidental disbursements, including expenses of maintaining said New York office. The disbursements made by this deponent as treasurer of the company are reported monthly to the auditor and the vouchers covering such disbursements are transmitted to him with such monthly reports and kept in his office at Dallas, and all journal entries connected with the transactions of the New York office are

transmitted to the auditor for entry upon the general books of the company which are kept in his office.

37 That the Texas and Pacific Railway Company has 336 miles of road in the State of Louisiana, making a through line from New Orleans to the Texas State line and thence to El Paso, in the State of Texas. The accounting covering all the operations of the said railway company and all its property in the State of Louisiana is had at the general offices of the railway company at Dallas, and the officers of the said railway company at Dallas are in charge and control of these matters.

This deponent further says that the entire road-bed and right of way of the Texas and Pacific Railway Company is situated in the State of Texas and in the State of Louisiana; that the machine shops, round-houses and all of the physical properties of the said Texas and Pacific Railway Company are likewise situated in the States of Texas and Louisiana; that the exercise of its franchises as a railroad company is confined exclusively to said States of Texas and Louisiana; that heretofore, to wit, in the year 1891, the Texas and Pacific constructed a large office building in the city of Dallas at an expense of $90,000, said building having a frontage of 30 feet and a depth of 120 feet, and being four stories high; that said building was constructed for the purpose of maintaining therein the general offices of the Texas and Pacific Railway Company, and since its construction the general offices of said company have been maintained therein, and are at this time being maintained therein; that the office of the general manager and the third vice-president of this company, the office of assistant general manager, the office of the general attorney for Texas, the office of the auditor and assistant treasurer are located in said building in the city of Dallas, and that the business of this defendant is conducted and carried on in said general office in the city of Dallas, and that claims, demands or judgments against this defendant are presented and audited in said general offices in the city of Dallas; that

38 all the records pertaining to the business growing out of the operation of said road are kept in said building in the city of Dallas. This deponent further says that all suits, claims or demands of the character sued for herein are handled by the proper officers of this company in the said city of Dallas, and this deponent is advised and informed that the claim sued upon herein was presented to and filed with this defendant at its general offices in the city of Dallas. This deponent further says that, in the event that final judgment should be recovered against it herein, the matter of auditing same would have to be done through the general officers of this company in said city of Dallas. This deponent further says that, by virtue of an act of the legislature of the State of Texas, entitled "An act to encourage the speedy construction of a railway through Texas to the Pacific ocean," passed May 24th, 1871, and an act supplemental and amendatory thereof, passed November 25th, 1871, authority was given to the Southern Transcontinental Railway Company and to the Southern Pacific Railroad Company, corporations created by acts of the legislature of the State of Texas,

to become consolidated with the Texas and Pacific Railway Company, a corporation created by an act of Congress of the United States; that, in pursuance of said act, said consolidation was perfected, and this defendant, The Texas and Pacific Railway Company, obtained various properties and franchises thereunder, and is exercising said franchises received by virtue and authority of said act at this time. Under and by virtue and authority of said act of the legislature aforesaid it constructed a line of road from the town of Marshall, in Harrison county, Texas, to the city of Jefferson, in Marion county, Texas, and from the city of Jefferson to Texarkana, in Bowie county, Texas, and from said city of Texarkana to the city of Fort Worth, in Tarrant county, Texas, which line of road this defendant is now operating in connection with its main line, which said main line commences at the city of Marshall, in
39 Harrison county, Texas, and terminates in the city of El Paso, El Paso county, Texas. That the laws of the State of Texas provides that the "public office of a railroad corporation shall be considered the domicile of such corporation." That in accordance with the laws of the State of Texas this defendant has established its public or general offices in the city of Dallas, Dallas county, Texas, and said general offices are at this time located and established in said Dallas county, Texas, and are considered by the Texas and Pacific Railway Company to be their public or general offices, and service upon said company in suits brought against it in the State of Texas and in said northern district of Texas can be had by serving any one of its general officers who are located and reside in the city of Dallas, or by leaving citation at the office of the third vice-president or general manager in said city of Dallas, Dallas county, Texas.

Deponent states that the defendant railway company is a corporation organized under the laws of the United States, and prays upon the hearing herein that reference may be had to its charter and to the laws of the State of Texas affecting the said railway company. That the annual meeting of the stockholders of the defendant railway company is held in the city of New York, and an adjourned meeting of said stockholders is held at the general offices of the company at Dallas. And that the same is true as well in respect to the annual meeting of the board of directors of said railway company. That the meetings of the executive committee of the board are usually held in the city of New York, which meetings are infrequent, averaging, say, two to four in a year.

C. G. MILLER, being examined by Mr. Taggart as a witness in behalf of the defendant, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

My occupation is freight agent of the Texas and Pacific
40 Railway Company at New Orleans. I am the local freight agent. There is a division freight agent and a local freigh agent. I was such local freight agent in October and November,

1894, and had been prior to November 12, 1894, such local freight agent about three years. I am now 30 years old. My office was situated at the foot of Thalia street in New Orleans. My duties as freight agent were generally in charge of the terminals at New Orleans and Westwego, the Texas and Pacific terminals, the warehouses and yards. The Texas and Pacific railway had in or near New Orleans on November 12, 1894, warehouses, yards and terminals as follows: The freight depot at New Orleans, at the foot of Thalia street, in which my office was located, and the cotton shed and sky lot or cotton warehouse—a cotton warehouse known as the sky lot—this is near the foot of Thalia street; then there were the yards at Gouldsboro, across the river from our terminals in New Orleans. There are no warehouses in Gouldsboro. There are machine shops there, a round-house, yards containing switches, principally for storing freight, but nothing for the storage of cotton and no cotton sheds or docks there. Then there were our terminals at Westwego, besides. These Westwego terminals were not built at the time I became freight agent. They were built during the time I was here as freight agent, but not under my supervision. I have not the plans from which Westwego was built; nor have I any of them. Mr. Taggart may have some of the plans.

Mr. TAGGART: I have not anything of that kind.

The bridge and building department of the Texas and Pacific road may have these plans. This department is in Dallas, Texas. I have no plans, specifications, maps, diagrams or other papers showing what the Westwego sheds were in October and November, 1894, in so far as the official diagrams are concerned. I did
41 have a pencil diagram within the past day or two—nothing else besides this. I did not say I had furnished them to Mr. Taggart. When I spoke of Mr. Taggart I had reference to a print that was under discussion here a day or two ago. I have not that blue print.

Mr. CLEVELAND: Will you please furnish them, Mr. Taggart?
Mr. TAGGART: No, sir; I will not furnish them.

I have no copy of the blue print or any other print or diagram of the docks at Westwego. Mr. Taggart should have this blue print.

(To Mr. Taggart:) Now, Mr. Taggart, I will ask you to produce this blue print.
Mr. TAGGART: I decline to produce the blue print which I have.

I have nothing else that will give an accurate representation of the Westwego docks as they existed prior to the fire. I know in a general way what the location was. I think Mr. Wathen, the chief engineer, would have a map or diagram showing the accurate representation of the docks as they existed prior to the fire. There are no maps or diagrams in New Orleans to my knowledge or information. I don't know of any photographs although I think, probably, our general attorneys, Howe, Spencer & Cocke, have a photograph; they did have one a while back. I have in my office

no such photograph; have no plan of our warehouses hanging on the walls of my office. I do not remember when I did last see one irrespective of the blue print. I suppose the blue print was furnished by our "B. & B." department, and probably the original design of the wharf. The wharf at Westwego, I think, was built by a
firm by the name of Griggsby Brothers, contractors. I don't
42 know where they are. My opinion is, and my recollection is, that they are a Texas firm. Beginning with those highest in authority, the Texas and Pacific railroad officials in October and November, 1894, were Mr. L. S. Thorne, third vice-president and general manager; next to him came Mr. J. W. Everman, assistant general manager; then, in the transportation department, Mr. N. G. Pearsall, first assistant superintendent; in the traffic department there was E. L. Sargeant, general freight agent, and Assistant General Freight Agent G. H. Turner; in the accounting department is R. Fenby, auditor; Local Treasuer L. S. Smith, and B. S. Wathen, chief engineer of the "B. & B." department. Those were our main officers. The persons who were immediately under me at Westwego at that time were Mr. A. L. Wilkinson, who was my chief clerk; there were various employees directly under Mr. Wilkinson and indirectly under myself; I cannot recall the names of all of them, but will give you such as I can. Mr. N. G. Figures was chief clerk for Mr. Wilkinson. There was a Mr. Smith, a cotton clerk; I don't remember his initials. Mr. Sykes was foreman, and Mr. Trainor, the gentleman here yesterday, was check clerk. There was a party by the name of Baker, also a check clerk. A man by the name of Valle Ruba, who was there, either a check or a delivery clerk; a man by the name of Kelly, either a check or delivery clerk. There were the Boylan watchmen, one by the name of Peake, one named Robau and one named Schoen; there was a private watchman by the name of Schurb, either a private or Boylan watchman; a private watchman by the name of Valle. Those are not all, but all that I can recall at this time at Westwego, aside from the laborers. I do not know the names of the laborers. A general description of the books that we kept in our office here in the city, in October and November, 1894, is, first, our cotton books in the cotton office—a record of cotton; we had in-bound-freight account books, cash books
and other books. The records were rather voluminous.
43 Q. Can you specify any more than these in-bound-freight books and cotton books?

A. No, sir; they embrace about all the records, I think.

Q. Will you describe to me all the documents which you, and by you—I mean the Texas and Pacific Railway Company—received, in relation to shipments of cotton from any point in Texas to Westwego in 1894, giving me the names of the various documents that the company received—notifications for the shipments of cotton, the names of the books, if any—in which any particulars from those documents were entered, and the general course of business in relation to any shipment.

A. The only document that accompanied the cotton was the waybill, a sort of manifest, showing each car and the marks of the cot-

ton, the bill of lading—or, rather the number of bales on the bill of lading—and the name of the shipper, and, in many instances, the name of the consignee and destination. Those are about all the documents that accompanied the cotton in New Orleans.

Q. Then in what book or books were any particulars from any of these papers that you have last mentioned entered in your office?

A. In our regular books, which we had for that purpose in our cotton office. These would probably be designated as our foreign cotton books. I am speaking from memory; that would probably be the books that these entries would appear in, for the reason that it contained the record of the foreign cotton.

Q. Look at the paper which I now show you, Mr. Miller, and which will be marked "Plaintiffs' Exhibit No. 4," which purports to be a bill of lading dated at Bonham, Texas, under date of the 5th of October, 1894. In the course of business did you receive such a document as that?

A. In the course of business we should receive it. We did not always receive it. What was termed a copy, supposed to be
44 a copy of the original bills of lading which went with a shipment. I do not know that we have a copy of this bill of lading. They are termed "ship's copies," and I am not sure whether we retained those in our office or turned them over to the steamship agents. I am satisfied we did turn some over to the steamship people here. We designate them as "ship's copies." J. B. Booth, whose name is signed on that bill of lading there in October, 1894, I presume is the agent of the Texas and Pacific Railway Company at Bonham, Texas. I know his name as such; I did not know Mr. Booth. The waybill would not accompany the ship's copy of the bill of lading; the ship's copy usually comes by mail or express, and the waybill comes with the car containing the cotton.

Q. I shall want to have the waybills that accompanied all of the cotton involved in these different actions. Where is the cotton book, which you speak of as keeping, in which you made some entries in relation to this cotton?

A. That is in my office.

Q. I want that, Mr. Miller, if you will produce that, please, and then the in-bound-freight books in which there is any entry relating to any of these bills of lading or shipments of cotton.

A. The in-bound-freight books I will explain are merely for the use of keeping our account of the freight charges. They would have no information as to the cotton. The waybill is simply entered up in there—the number of the billing—where from, and the steamship line via which this cotton is consigned, with the amount of charges due us.

Q. Then I will ask you to produce the in-bound-freight book, so that I may look at it, Mr. Miller, and you will also, of course, produce the cotton books. Now, what books were kept at Westwego?

A. We also kept cotton books at Westwego, somewhat similar, as to the purposes for which they were used, to the books we kept in

the office at the foot of Thalia street—my office. I do not know whether we have the cotton books that were kept at West-
45 wego, whether we saved them from the fire or not. I am informed that some of the records were burned. I performed my duties of local freight agent principally at New Orleans. New Orleans was the central location. I spent most of my time here in New Orleans. I had no regular time to go to Westwego; I went up pretty often during the busy season. I may have on several occasions sent a chief clerk or a clerk up to Westwego. Mr. Steel was not my chief clerk, he was my chief cotton clerk whose office was in the same building that my office is in New Orleans; he did not frequently visit Westwego for me, he went there, I suppose, from time to time; he did not go as frequently to Westwego as I; I went to Westwego for the purpose, generally, of supervising the handling of the business there; I was up there probably a day or two previous to November 12, 1894. I do not recollect the fact as to the exact date. At the time I was there, a day or two prior to November 12, it is likely that there were about the same number of bales of cotton at Westwego as were there at the time the wharf was burned; that was about twenty thousand bales. I cannot give it to you to the bale. It was not much in excess of twenty thousand bales so far as that burned on the wharf is concerned; probably a few hundred over. I don't know exactly how many bales were burned on the wharf. I have had a computation made of how many bales were burned and it is at the office; it was about twenty thousand on the wharf and about two thousand in the cars; I say approximate figures; I do not know as to the date of the last delivery of cotton on board ship at Westwego prior to November 12, 1894; but during the week previous we delivered cotton. There were likely no bales of cotton delivered at Westwego on November 11th, that is, unloaded from cars and placed in the sheds; November 11th being Sunday, I doubt if there was any, though there may have been some unloaded; we did work at times on Sunday up there; I doubt whether we were working on November 11th, 1894; I don't recollect as to it
46 at all; on November 12th I was in New Orleans; I am not positive; I may have been at Westwego, but I don't think I was. I have no doubt I was working at my office on November 11th, 1894; I cannot recall the fact; I may have been; I cannot say how many bales were delivered at Westwego on November 10th; I cannot tell from the bill of lading, "Plaintiff's Exhibit No. 4," when the cotton mentioned in this bill of lading arrived at Westwego. This particular bill of lading is marked No. 35; that I judge to be the consecutive number of bills of lading issued at Bonham, Texas; that is, the export bills of lading issued. On the next line is "T & P. Contract No. 44;" that refers very likely to the contract that we make here with the steamship agents. The marks "3830 Denistown, 11495/2," I do not know what they refer to. I have not my letter-press copy books here covering the year 1894.

Q. I shall want them, please, Mr. Miller.

A. Yes, sir.

I have not individually received from the plaintiffs in this action

certain letters or demands. I do not know whether the company has received them or not. They would not necessarily come into my department. They would likely come to our freight claim department at Dallas, Texas. I have no such documents in my possession. Any that I might have received would have been forwarded on to our freight claim department. My letter-press copy books would contain copies of the letters transmitting these documents. Mr. Fenby is located in Dallas; he probably would have those documents. I had something to do with employing the Boylan men, and very likely saw Col. Boylan prior to November 12, 1894, in the month of November; I do not recollect; I do not recall any specific dates; nor in the month of October; I recall that I saw him generally from time to time. We probably had some correspondence with him in October and November, 1894. I usually wrote the letters in my office. I had a stenographer. A record was kept of the pay-
47 ments that were made at New Orleans to the various employees at the office. We made payments at Westwego to the employees up there; to nobody but the laborers, so far as my office is concerned. The laborers only were paid at Westwego. The check clerks, shipping clerks and the clerical force at Westwego were usually paid, if I recollect rightly, by the paymaster on the pay-car. My recollection is that the paymaster stopped his car at Westwego en route to New Orleans, and that he made those payments from the pay-rolls. I should have the accounts of these employees in my office. In November, 1894, the railway company had regularly employed at Westwego one day watchman, a private watchman, not far from the Boylan office, and one at night. The name of the day watchman employed at the time of the fire was Schurb. The name of the night watchman was Valle. The main man in charge of the clerical force at Westwego was Mr. Wilkinson. He had been in the employ of the company since along in the early spring of the year 1894, probably February. He was called chief clerk. There was a Mr. Roth, superintendent of the Westwego elevator; not of the wharf, however; there was no superintendent of the wharf. The person in charge of the wharf for the railway company was the chief clerk, Mr. Wilkinson, so far as the party located permanently at Westwego was concerned. Next under him was Mr. Figures, who was Mr. Wilkinson's chief clerk; then there were the other employees that I named as being up there; the question of rank with them did not cut much figure. They were called clerks, men employed in the office to do clerical work; and then the check clerks—men on the outside—to check cotton from the cars. Mr. Figures had been in the employ of the company since the latter part of the summer of 1894, as I recollect. He was employed by Mr. Wilkinson. Mr. Sykes was employed at Westwego as foreman; he was generally in charge; his duties were in charge of the labor
48 on the outside, the labor and check clerks. He is still employed by the company. I think Mr. Wilkinson is still employed by the company. I do not know that. Mr. Wilkinson was not discharged by the company soon after the fire. The fire occurred November 12; it was probably in the latter part of Novem-

ber or early in December that his services were dispensed with, if at all. He ceased to draw pay from the company in the latter part of November until I do not know what time. He has not been employed here in New Orleans since that time. I employed Mr. Wilkinson. I don't know whether Mr. Figures is in the employment of the company now or not. I think he is in the employment of the company somewhere in Texas. When he left New Orleans he left here to go to Terrell, but I don't know whether he is in Terrell yet or not. He was working for the Texas and Pacific Company after the fire about the same time that Mr. Wilkinson was, between the latter part of November or early part of December, and was re-employed by the company probably two or three weeks afterwards, probably in the middle or latter part of December. I do not remember how long Mr. Smith had been in the employ of the company prior to the fire. I think he probably came to Westwego about the same time as Mr. Figures, probably the latter part of the summer of 1894. Mr Figures and Mr. Smith were employed by Mr. Wilkinson. I will say in connection with that, that I was usually consulted by Mr. Wilkinson, and that the clerks were employed with my approval, generally, and in the most important cases particularly. I do not know exactly what men familiar with the handling of cotton the Texas and Pacific had in its employ in November, 1894, who had been in its employment during the previous season. We probably had several. On the outside in New Orleans was John Driscoll, who was a sort of foreman. At one time he was chief discharging clerk at New Orleans; he was employed in October and November, 1894; he was not at Westwego; he was employed at New Orleans and is yet. I do not know that we had any
49 men at Westwego familiar with the handling of cotton, as we understood it, whom the road had had in its employment the previous season, except Mr. Sykes, who was in our employ the previous season. The previous season he was probably check clerk at New Orleans, and may have been at Westwego also. He is now in the employ of the company as check clerk.

Q. Then, with the exception of Mr. Sykes, the whole force at Westwego that season of 1895 was a new force, was it?

A. No, I do not say it was a new force. I do not recall sufficiently as regards the Westwego force. I know that Mr. Wilkinson was a new man and Mr. Figures.

Q. Did the Texas and Pacific Railway Company have any contract with any steamship company other than the contract which you say is referred to under the bill of lading marked "Plaintiff's Exhibit No. 4," as T. & P. contract No. 44?

A. Yes, sir; it did.

Q. I would like to have any other contract that they had?

A. From that I understand that you want the contracts covering all the cotton involved in these suits?

Q. Yes, sir.

A. I do not recollect any correspondence had after the fire concerning any new contracts to be entered into with the steamship companies. The question of contracts was usually handled verbally

between myself or my representatives and the steamship agents. No. 44 is a written contract. I referred, however, to the making of contracts which was handled verbally. All contracts we have with steamship companies are in writing. I have a list of those contracts. I do not know that I have any reports from Col. Boylan received by the railroad company during October and November, 1894. The reports furnished us in the ordinary course of business we do not retain. They are put in the waste-basket as a rule. They were merely in the nature of incidental reports, and we don't
50 make a practice of retaining any of them. I received a report shortly after November 12th in regard to the fire from Mr. Boylan. That was sent on to the auditor at Dallas. I do not know whether I have a copy or not. I think Mr. Valle is still in the employment of the company, and has been continuously since November, 1894, to the best of my recollection, in various capacities, He was employed to my certain knowledge in the capacity of car-checker and watchman. I remember that distinctly. He was employed for a while at Westwego also, if I remember rightly. It is not a fact that I could not tell where any single lot of cotton was about November 12, 1894. I could, as a rule, always tell where cotton was from the records. One record we might tell from would be the waybills that accompanied the cotton. The waybill would be the primary record; any other record would be made from the waybill. The waybill told whether the cotton had arrived, from the mere fact of having the waybill. It came with the cotton always. It always came with the cotton. The waybill did not come in the freight car, it came in the possession of the conductor who brought in the freight car and from the waybill we made up whatever record we had. One record we made up was the entering of the waybill in the cotton book—we will say the foreign cotton book. Another record we made up was transfers. Made up a skeleton for the check clerks to check by. That was all done at Westwego. The waybills came from Westwego to my office usually the day or the day after the arrival of the cotton at Westwego. I am not positive whether we kept a separate record that was made up from the waybills at my office. I do not know what records were kept at my office in respect to that detail. I am not positive whether we kept a separate record or not, but I imagine we did. I call that record the foreign cotton book. That was made at the New Orleans office, the one I had at New Orleans and another book at Westwego. I do not know that we had any special term for the book that we had at Westwego.
51 We would only have use there for but one book. There were two cotton books, I think; one at Westwego and one at New Orleans. They were practically duplicates of each other, each made up from the waybills. I think I have all the cotton books which were kept at Westwego or New Orleans. Some one of the clerks at the Westwego office kept the record at Westwego that was made up from the waybills there. In November and October, 1894, probably Mr. Smith or Mr. Figures kept it. It is not the fact that the waybills remained at Westwego and the bill of lading came on to New

Orleans. The waybills first came to Westwego and were then forwarded from Westwego to New Orleans. The bills of lading came by mail or express usually; didn't accompany our shipments of cotton at all; they came direct to our New Orleans office and never came to Westwego. The waybills were usually sent over every day by mail or messenger; sometimes by messenger and sometimes by train mail, the system about it was at this time that the waybills were sent by the route that was most convenient for them to come by in order to send them over with the least delay. We had a train mail coming in at the close of the day, about seven o'clock, and another one next morning about seven, and the waybills at Westwego, not worked up in time for either of those trains, would likely come down by messenger during the day. I don't recollect the name of the messenger. We had a messenger who used to come with papers from Westwego regularly. I can find out his name for you. This messenger's duty it was to bring by hand waybills from Westwego to New Orleans; my recollection is that this messenger was located at Westwego, and that he was sent to New Orleans when the occasion should arise for sending him down with any mail matter. I have not found out yet when last prior to November 12, 1894, any ship took cotton from our dock at Westwego.

Q. What is the first matter that you have prepared for me this morning, Mr. Miller?

52 A. I have the cotton book. That is one of the documents you asked for. The book now produced is called "Contracts Foreign Cotton." The book I referred to in giving the previous testimony as being designated as foreign cotton, I find that, while I have that book, the particulars of handling and billing was not exactly as I stated; that is, as to the detail of it, and I find waybills are not entered here in that book, but that the bills of lading were; that is, the ship's copy of the bills of lading. The book that I now produce and which is marked on the outside "Season of 1894/1895, contracts foreign cotton," is not what we call the foreign cotton book. We have a number of cotton books. The foreign cotton book in which entries are made of bills of lading, we have that book at my office. I left it there today for my cotton clerk to use in checking up the other matter that you have asked for. He needs them but don't need this, so I brought this one down. As to the Westwego cotton book, we did use a cotton book, but that I distinctly remember is not at my office and that book was probably burned during the fire. That was not an especially important book. We have the same data in the way of transfers, waybills, cotton skeleton waybills.

The skeleton book was the book of first importance at Westwego; that is, at my office; I intend to produce it. The skeletons are simply abstracts of the waybills. We had a cotton book besides up there. We have a car-record book, the record of the car report and which are kept in a book. I have that here. Those are about the principal records we have there. I don't remember of any other records that we have. The waybills and bills of lading were not kept at Westwego. The books that I have named are about the

principal documents that we kept there. I do not know that the skeleton waybill book called the skeleton book, the cotton book and car-record book were the only books that were kept there. We had two or three clerks at Westwego. I did not say that only
53 three books were used over there; that is all that I recollect. I do not recall any others. We had two or three clerks at Westwego, and they had other duties at various parts of the wharf. They had to make up the skeleton report, writing it up from the waybills; their time was not confined to office work; they had ample work, however, to keep them busy. I have some waybills here which you may examine if you would like to do so that show the arrivals at Westwego. The foreign-contract book was kept at New Orleans. I have the car-record book here.

Book produced and marked "No. 9" for identification.

This is the only book which I have that was kept at Westwego. The skeleton book is at my office. I have not figured for you how many thousand bales of cotton were stored in the sheds at Westwego on November 12, 1894, because I have had my hands full figuring up what I have here for you. I have impression copies of the pay-rolls of the employees at Westwego.

Q. And these pay-rolls were kept at Westwego?

A. The Westwego pay-rolls were made up at Westwego, so far as the extra-labor rolls are concerned, then sent to my office. We took impression copies of them, and then remitted them as cash to the credit of the station.

Q. Mr. Miller, what next have you prepared for me in answer to my request made when you were on the stand yesterday?

A. I have only received the abstract book in which the waybills are entered up for the purpose of keeping an account of the revenues and freight charges.

Q. Have you obtained for me the particulars as to how many bales of cotton were unloaded at Westwego from the 1st of November?

A. No, sir; I haven't got that yet; but I have the particulars as to what steamers we delivered cotton to during the week prior to the fire.

54 Q. Please let me have that.

A. This is what I term a berthing report—a report made from the Westwego office to my office daily of the vessels at the wharves up there. The others that I have date from November 5th, and cover each day up to and including November 11th.

Q. These berthing reports cover the hours of 7, 12 and 6 p. m., on each of the days they purport to give the particulars of?

A. Yes, sir.

The berthing reports are produced, offered in evidence as plaintiff's exhibits, marked 17 to 23, inclusive, and made part hereof. (Not printed.)

The first column indicates the grain wharf; then there are two columns headed "1" and "2," which indicate the two cotton

wharves, cotton wharf No. 1 and cotton wharf No. 2. Cotton wharf No. 1 was the wharf downstream towards the elevator; the shed was upon the wharf. No. 1 wharf contained No. 1 shed. There was no break in the line of the wharf along the river front; it was all one continuous wharf, so far as the cotton wharf was concerned. The grain wharf ran up and connected with the cotton wharf at the lower end of the cotton wharf. The cotton was all upon one continuous wharf, but divided arbitrarily into Nos. 1 and 2 in accordance with the sheds. The report of November 5th shows that on that day there were loading at No. 1 cotton wharf the steamship "Hajeen," bound for Bremen, on account of the Elder-Dempster line; and at cotton wharf No. 2 the steamship "Straits of Magellan" was loading. The figures "total 2,994," concerning the "Hajeen," mean that up to and including the 5th of November we delivered to the steamship "Hajeen" 2,994 bales of cotton, and 1,908 bales of cotton to the steamship "Straits of Magellan." The report of the 6th shows the loading of these steamships, so far as the cotton wharf is concerned. And
55 the report of the 7th shows that the "Hajeen" finished loading at 11 a. m., and had taken up to that date 4,729 bales. The report of November 7 shows that the steamship "Electrician," for Liverpool, on account of Harrison & Company, dropped down to No. 1 wharf at 12 noon. The report shows that the "Electrician" and "Straits of Magellan" were loading at No. 1 and No. 2 wharf in the latter part of the 7th of November. The report for the 8th of November shows that the "Straits of Magellan" left at 9 a. m. on the 8th of November, having taken 2,997 bales; and that the "Electrician" was still loading on the 8th of November. It also shows that the steamship "Malabar" came to No. 1 wharf on the 8th of November at 1 p. m. for cotton-seed cake. The report of the 9th of November shows that the "Malabar" dropped back to the elevator at 2 p. m.—couldn't load—and that the "Electrician" was still loading and left at 12.30 p. m., having taken then 2,413 bales.

The report of the 10th of November shows the steamship "Malabar" loading at No. 1 cotton dock and the "Elberfeld" arriving at No. 2 cotton dock, and loading cotton-seed meal and cotton-seed cake. The report of November 11th shows the "Malabar" moved to the elevator for a tug to make water, and the "Elberfeld" was still loading cotton meal, and the "Malabar" returned at 6 p. m. for cotton-seed cake on account Steinhardt & Company. I have no report of the 12th. I don't imagine it was made. I have no record of it. I judge, on account of the fire, that things got confused.

Q. What was the next thing I asked you to ascertain for me?

A. I have the original bills of lading, with data.

Q. Please produce them.

A. The cotton book at Westwego has been found, so my office telephoned me. It is at Westwego, and will be produced, and they are instructed to bring it down first thing tomorrow morning.

56 Q. Now, Mr. Miller, I show you plaintiff's exhibit, which is marked for identification, "No. 4," being the bill of lading

I called your attention to yesterday, dated at Bonham, Texas, on the 15th of October. Will you be good enough to tell me when the cotton mentioned in that bill of lading arrived at Westwego, and explain to me the system by which you check your account of arrivals?

A. I will have to refer now to the car-record book. (The witness, after referring to the car-record book, says:) I have here the waybills from Bonham, Texas, covering the cotton. Bonham bill of lading No. 35, which was issued for 200 bales. These waybills accompanied the cars and the cotton into Westwego. They are eleven in number. Referring to the eleven waybills, I ascertain that one bale of cotton marked "O. X. F./O;" 15 bales of cotton marked "J. A. X. O." reached Westwego in T. P. car No. 6506. In order to find out the date at which T. P. car No. 6506 reached Westwego I am obliged to look into what we call the "car record" book, and to hunt over that to find the number of the car. I find further that 50 bales marked "O. X. F. O." were received at Westwego in T. P. car No. 6120. I find further that 16 bales marked "T. C. U. P." arrived at Westwego on T. & P. car No. 6293. I find furthermore that 49 bales marked "T. C. U. P." in T. & P. car No. 16 reached Westwego; also that 50 bales marked "T. C. U. P." reached Westwego in T. & P. car No. 6564. I find that 16 bales marked "S. A. B. O.," and three bales marked "T. C. U. P." reached Westwego in T. & P car No. 6506. That completes the 200 bales. In order to find the date of the arrival of any one of these cars, I look into this car-record book. The first car mentioned, T. & P. 6506, arrived at Westwego October 24th, 1894; the next one mentioned, 6120, arrived at Westwego October 23, 1894; the next one, No. 6293, arrived at Westwego October 23, 1894; T. & P. car No. 16 arrived at Westwego October 22, 1894; T. & P. car No. 6564 arrived at Westwego October 22, 1894. If a shipper of cotton had come to me on the 25th of
57 October, 1894, and asked me whether his cotton shown on this bill of lading had arrived at Westwego, the method which I have indicated would have been taken to ascertain whether or not his cotton had arrived at Westwego. I am not sure, when Westwego transmitted these waybills to my office, whether it sent with these bills of lading a letter of transmittal, showing the train and date of arrival at Westwego. If Westwego did not and if the cotton had not been unloaded, even though it were at Westwego, the waybills in my office would show that it had arrived at Westwego, and if we had this other data as to train and date we could give the exact date. Under the condition that I have mentioned we would have to go through all the hunt that we have lately gone through in order to ascertain the date of arrival. If the consignee insisted on knowing the exact date it came in there we would have called on Westwego, and the advice we had from Westwego would show that; we would have to ask Westwego as to the date it arrived. During October and November, 1894, I suppose, twenty-five or thirty thousand bales of cotton arrived at Westwego, and we had thousands of waybills covering this cotton, and every day or two we had one of these sheets in the car record book,

Exhibit No. 9, giving the numbers of the cars. If a shipper had asked if any of his cotton had gone forward we would have been able to tell that from our office record if the cotton had gone forward. We obtain from the steamship agent after the cotton goes forward the master's receipts. It is unusual, however, for a shipper to make inquiry at my office as to cotton in transit; through cotton. In the case of a New Orleans shipper who wanted to know about his cotton, he could find out either by the steamship agent or by asking my office. The first thing that would be consulted if he asked my office would probably be the waybill. The record that we would consult, if he wished to know whether it went forward on the ship, would be the record of what was delivered
58 to that ship. We received what was called a "mate's receipt" from the mate of the steamer for each particular lot of cotton. I am not sure whether the Westwego office kept anything else or not. I am not sure that this cotton book we will have here tomorrow shows the steamer on which that cotton was shipped aboard. We had a system of notifying the steamship company when any particular lot of cotton had arrived. We kept the steamship company fully advised of the amount of cotton on hand ready for delivery. I do not think we had any particular correspondence with the agents of the Elder-Dempster line on that subject. We transmitted to the various steamship agents what we called "transfers," containing a full description of the cotton, giving the bill of lading reference and the contract reference, and with each batch of those transfers we sent a letter of transmittal. We have that.

Q. Please show me where you made any reference to any of the cotton mentioned in bill of lading No. 35, Plaintiff's Exhibit No. 4.

A. Our record is not entirely complete as to the original transfers. I know that some of these transfers are missing. I understood from my chief cotton clerk that he had a memorandum attached to these documents showing what was missing. Those that are missing we have impression copies of, and I have here some original transfers, but don't find any covering this particular lot of cotton. I show you a sample of transfer sheet, which I call transfer sheet No. 2070, form 1108, which is marked "Plaintiff's Exhibit No. 24." This is an original transfer sheet that we sent to Elder Dempster & Company. I have not the date here on which we sent that particular sheet, but the letter book will show. The letter book gives reference to the transfer-sheet numbers. I have not the letter book here. The original transfer sheet was sent to Elder Dempster & Company. After the fire, in fact, the night of the fire, we sent down to the steamship offices to get what transfer sheets they held, to have
59 them returned to us, and we obtained some that night from some of the offices, but I believe the office of Elder Dempster & Company was closed when we got there, and we either sent down a man the next day or we communicated with Elder Dempster & Company and they sent them up to us. We sent around to the steamship companies to get back these papers in order to enable us to work up our records and ascertain and locate the cotton that was burned, etc., in order to facilitate matters. We did not send to the steam-

ship companies any other class or kind or character of notice than this, which is called the transfer sheet. If a shipper made inquiry at New Orleans as to whether his cotton had gone forward to Liverpool, we might have to look at the mate's receipt, which would depend on the lapse of time before the shipper made the inquiry.

Q. This cotton that arrived on this first bill of lading on the 24th of October, which is the last date that any of it arrived at Westwego, how much of it was burned in the fire?

A. If it was on the wharf, it was all burned. According to the record here and the notations on the billing, it was all burned; all of the 200 bales. I do not recognize the notations on those 11 waybills which you mark from No. 25 to No. 35, inclusive. The marks were made long subsequent to the fire. The book here ought to show similar information to that. The book which I produce this morning, and which was marked for identification "No. 36," has entered up in it contracts with the steamship agents. These contracts are usually numbered consecutively. That contract No. 44 is the one that these 11 waybills figure is covered by that Bonham bill of lading No. 35. As the cotton arrived covered by the respective contracts, and was entered up in this book—the bill of lading reference was posted up in the book. For instance, Bonham bill of lading No. 35 appears as entered on page 90 of the book, and the entry is as follows: Date of bill of lading, October 15th; bill of lading No. 35, issued at Bonham. The number of bales covered by that bill of lading was 200, with the various marks. The consignor was Castner & Company; the consignees, Newell & Company. The record shows under the column disposition of bill of lading, there is a ditto mark under the "M. R." for "master's receipt." That ditto mark is evidently an error, for the reason that the cotton, being burned, there would have been no master's receipt issued. I cannot say when the record on page 90 of this record was made, nor by whom it was made, because I do not recognize the handwriting. I did not keep this book, and I don't know who did. It was kept at my office in New Orleans.

Q. Mr. Miller, with the bills of lading, your car-record book, your contract book and your waybills before you, you are not able to tell whether any of this cotton was burned at Westwego?

A. I have just shown from the waybills that the 200 bales were burned there.

Q. You show me from page 90 of this book that you have master's receipts for them. Now which is true?

A. I judge the notations on the bills of lading. It would surprise me to find that neither was true. We were in the habit of sending to the steamship company, and we would send them what is termed the ship's bill of lading; that is, a copy of the original bills of lading issued.

Copies of the original bills of lading were made out at the shipping point and sent to my office. I retained one and sent the steamship agents the other. We probably did send the ship's bill of lading for the 200 bales of cotton mentioned in the bill of lading No. 35, but I cannot say as to that. I do not know whether we kept

any record of that or not. As a rule, if the ship's agents do not receive all of the ship's copies of bills of lading by the time the steamer is ready to sail, they call on us for them.

Q. That adds another complication. How did you know whether they had all the ship's bills of lading?

A. They know what cotton the ship takes delivery of. We
61 send them attached to the bill of lading a master's receipt to be signed. The master's receipts are signed after the steamship people take the cotton aboard the vessel. We send them receipts to be signed then. The receipts are made out in my office in New Orleans and sent down to the steamship company's office to be signed.

Q. From what material do you make out your mate's receipts?

A. The master's receipts; the steamship agents furnish a blank form—a sort of bill-of-lading form. We fill out those blanks from the bills of lading. We get the reference covering the cotton from the bills of lading.

Q. Now, Mr. Miller, is not this subject a little confused in your mind?

A. No, sir.

Q. I wish you would state it to me. It is in mine. Tell me how you knew on, say, the 10th of November, whether any of this cotton, the 200 bales mentioned in Plaintiff's Exhibit No. 4, had been shipped?

A. All that I know and all that I am going by in stating that it had not been shipped, but burned, is the notation on those waybills.

Q. But that was after the fire. I am speaking about the 10th of November.

A. Well, as a matter of course, if it had been shipped it couldn't have been burned.

Q. Place yourself back to the 10th of November, and before the fire, and tell me how, on the 10th of November, you would know if anybody inquired whether any of those 200 bales of cotton mentioned in this Plaintiff's Exhibit No. 4 had been shipped or not.

A. The proper course for that would have been to have looked up, first, to see if the cotton had arrived; after determining that, then to look through the records to see whether it had been shipped. I do not know whether this foreign contract book said on November 10th that this cotton had all been shipped or not. I cannot tell as to
when that entry regarding the master's receipts was made
62 on page 90. There are various other records that could have been consulted independently of this book. We might have consulted the mate's receipts of the steamship to see if the cotton had been delivered to the steamer. The mate's receipts would have been the most reliable data.

Q. You mean to say you would look through your file of notes, receipts, of which I presume you have thousands, in order to ascertain whether this cotton had been shipped?

A. That would have been one way to have gotten at it. If I had looked at page 90 of the foreign contract book, and that book on

that date was as it is now, the indications would be that a master's receipt had been issued for this cotton. I can't tell from anything I have here whether the master's receipt was in fact issued or not for this cotton. I do not know from what particular data or record the indorsement "burned at Westwego" was made on the way-bill. I do not know who made it. I do not recall any specific instructions which I gave as to ascertaining what cotton was burned at Westwego. I did not work up the matter of ascertaining what cotton was burned at Westwego at all. Several of the clerks I had did this. One of them was Mr. Bynum, who was chief clerk at that time. He is now connected with the Illinois Central, I think. His name is E. A. Bynum. He left our employment probably in the spring or summer of 1895. Mr. Pierpont was also engaged in this work. He is still with us. Mr. Lonegon was also engaged on it; that is all, I think, the principal men that worked it up. From the records I have here at this time, I cannot tell from what sources those entries on the waybill, "burned at Westwego" were made. I do not know why my book is wrong, if it is wrong. It would surprise me to learn that both the book and the waybill were wrong.

Q. I asked you to prepare some other matters for me. It seems we have gone as far as we can with this.

A. You asked me to bring you the contract covering Bonham bill of lading No. 35. The contract is No. 44 and I produce that document, which is as follows:

63 "*Original.*

"Form #2370.

Texas & Pacific Railway Company.

"NEW ORLEANS, LA., 9/29, 1894.

"Messrs. Elder, Dempster & Co., S. S. line:

"I have this day engaged 20,000 bales cotton for shipment by the Elder-Dempster Company's S. S. line for Liverpool, England, at 49.21 per 100 lbs. compressed cotton, delivery during months October, November, and December, 1894, as per conditions on the reverse side of this contract. Contract #44. P. pro Elder-Dempster & Co., by M. & R. Warriner. Yours respectfully, C. G. Miller, agent T. & P. Railway Co."

On the back of this sheet of paper is the following:

"Elder Dempster & Co. agree to pay the Texas & Pacific railway any insurance claims presented by shippers that are in excess of 3 cents per bale over the recognized first-class insurance quotations. Elder Dempster & Co. further agree to pay the Texas & Pacific Railway Co., one-half of any insurance claims presented by shippers that may not be in excess of three cents per bale, it being understood that on claims presented for an amount in excess of three cents per bale, Elder Dempster and Co. are to pay Texas & Pacific railway the amount in excess of 3 cents per bale and one-half of the remaining three cents per bale.

"The foregoing agreement only applies to cotton forwarded on chartered steamers, Elder Dempster & Co. agreeing to protect the Texas & Pacific railway against any claims whatever account excessive insurance on cotton transported on steamers belonging to Elder Dempster & Co. C. G. Miller, agt. Tex. & Pac. Ry. Co., New Orleans, La., Sept. 29th, 1894, p. pro. Elder Dempster & Co., M. & R. Warriner."

Q. Now, are there any other matters you are prepared to answer that I have inquired of?

A. You asked me as regards the messenger service between
64 Westwego and New Orleans. The name of the messenger was Simons, a colored boy. Then I brought some books here, the in-bound freight account, which I mentioned a while ago.

Q. Tell me the course of business which the Texas and Pacific Railway Company followed with the Elder-Dempster Steamship Company concerning the shipments of cotton from New Orleans which had been carried by the railroad from points in Texas and brought to New Orleans.

A. Do you refer now to New Orleans proper or to Westwego?

Q. Did you make any distinction?

A. We made this distinction, that cotton for New Orleans proper was drayed to the ship's side, and the cotton brought into New Orleans at Westwego was placed on the wharf from the cars. The railroad company, in the first place, made certain contracts with the steamship companies or with steamship agents for carrying before the cotton would arrive.

Q. Mention the names of the various steamship agents with whom the Texas and Pacific Railway Company made the contracts for the season 1894–1895.

A. Very likely with every regular steamship agency here. There was the Harrison steamship line, which I knew of that we had contracts with, and the West India and Pacific steamship line, Elder-Dempster & Company, Hammond & Company, the French line or French commercial line—that line changed its name within the last few years, and I am not sure which name it was going under then; the steamship lines for which Miller, Meletta & Company are agents. The G. L. & S. or L. & H. lines were the other principal cotton lines, and there was the Hamburg-American Packet Company handled by the same agency. These are about all the lines that I am certain we had contracts with. I recollect the original contract which I produced the other day between the Texas and Pacific Railway Company and Elder, Dempster & Company. We should have the original contracts with these various lines that I have mentioned.

65 Q. I shall want to have you produce them.

A. Those contracts were not called "season contracts;" the only term we had was "contracts." We had no season contracts, only contracts for specific ports and places. In addition to these general contracts or this general contract which we had with Elder, Dempster & Company, we may have had other contracts

with Elder, Dempster & Company besides; yes, we did have others besides contract No. 44. All these contracts with the other lines specified a rate of freight. Letters were not written to Elder, Dempster & Company for each additional contract; the contracts were usually handled without any letters at all; in fact it was customary to handle them out in duplicate on a regular printed form filled out in duplicate, one of which was signed by myself and given to Elder, Dempster & Company or the steamship company, and the other signed by them which was retained by myself. The next step towards the fulfillment of this general contract No. 44, or any one of the special contracts with Elder, Dempster & Company, taken by the railway company, would be, I presume, to have the cotton shipped in Texas. On the arrival of the cotton here it was unloaded, and after the cotton arrived the Texas and Pacific Company would furnish Elder, Dempster & Company next a notice of the arrival. This notice of arrival was in the form of a transfer slip such as I produced the other day.

Q. In no other form? They are always in the form of transfer slips?

A. As to each individual lot, yes, sir. That was our regular recognized course.

Q. Did any other paper pass between the Texas and Pacific Railway Company and the Elder-Dempster S. S. Co. between the making of the contract and the forwarding by the railway company to the Elder-Dempster S. S. Company than the transfer slips?

A. In sending them those transfer sheets we wrote them a regular letter of transmittal with the transfer sheets. This letter was not on a printed form, but it was a regular letter.

66 Q. What was the next step after you sent the transfer slip to the steamship company?

A. Then it remained for the steamship company to take delivery of the cotton, send a steamer to Westwego and get it. Usually the transfers would be returned to us, either indorsed on the face of the transfer by the steamship agents to deliver the cotton to a certain steamer, or a letter of transmittal returning the transfers. Either practice was in effect.

The practice was for the steamship company to return the transfer slips which had been sent to them with certain particulars filled in by the steamship company, indicating what lots of cotton the steamship company was ready to take delivery of.

The next step was for the steamer to go to Westwego and take charge of the cotton.

Q. Before the arrival of the steamship at the dock at Westwego was there any paper which passed between the steamship company and the railway company, or the railway company and the steamship company, than the papers which you have now described?

A. There would be nothing in the way of affecting the delivery of the cotton.

Q. Irrespective of what you may think the effect of this paper would be, I am asking you, Mr. Miller, whether any other paper would pass between the steamship company and the railway com-

pany prior to the time of the arrival of the steamship at the dock at Westwego, than the papers which you have described.

A. I was going on to explain that the ship's copies of the bills of lading, if they reach my office prior to the time that the steamer went to the dock in a number of cases those bills of lading were sent to the steamship companies. Wherever I have spoken in any part of my examination of "ship's copies" of bills of lading, I mean duplicates of the bills of lading which were issued by the agents of the railway company at the various shipping points in Texas.

There was no other class of paper that passed before the arrival
67 of the steamship at the dock, than the papers to which I have testified. Upon the arrival of the vessel at the dock the employés of the railway company at Westwego, in company with some one of the ship's employés—the mate probably—would go around and count the various lots of cotton that were there and the mate would give us what is termed a "mate's receipt" for that cotton before loading it on the vessel.

Q. At or shortly prior to the arrival of the steamship the cotton designed for that steamship would be brought out on the dock by the railway employés, would it not?

A. Not necessarily; that would depend upon where the cotton was; and in a number of instances the mate of the steamer would receipt to us for it, and the steamship labor would truck the cotton from where we had it on the dock to the vessel.

Q. Prior to the arrival of the steamship at the dock did you ever receive any document from the ship?

A. No, sir.

Q. Having received the mate's receipt for the cotton thus counted by the mates, destined for shipment on the steamship, what would you do with those mate's receipts?

A. The mate's receipts, I think, were taken in duplicate. The original mate's receipt was sent from the Westwego office to the freight office—my office at the foot of Thalia street—and duplicates retained at Westwego. The mate's receipts received at my office in New Orleans would be filed there, with the possible exception of the steamship agency of Miller, Melletta & Co. They years ago and possibly were doing it at that time, established a new rule that we would surrender mate's receipts to them before they would issue master's receipts; but they were about the only agency doing that at that time. After the cotton was placed aboard the vessel we would receive master's receipts. As a rule all cotton receipted for by the ship goes aboard the vessel that is loading at the time; but there are exceptions to that rule. We sent a copy of the mate's re-

ceipt to the steamship company and received in exchange
68 the master's receipts only in connection with the one firm of Miller, Melletta & Company. We did not receive what are called "ocean" bills of lading from Elder, Dempster & Company at any time that I recall; ocean bills of lading—master's receipts, as they are called, and which are recognized as such—it wasn't customary for railroads to receive. Those were usually given to the shipper in case the shipper preferred what is called an ocean bill of

lading to a master's receipt. The mate's receipt was the prime evidence that the railway company had of a delivery on board of a ship of any cotton. The railway company had nothing else than the mate's receipt, unless it was the master's receipt, and that was secondary evidence where the mate's receipts were not surrendered.

Q. What period of time usually elapsed between the receipt by the railway company of the transfer slips from the steamship company and the arrival of the steamer at the dock at Westwego?

A. Well, that would all depend. At times the transfer slips were returned to us before the steamer would arrive. At other times the steamer would be in the river at some city wharf expecting to go to Westwego the next day or several days after. At other times the slips were probably returned the same day the steamer went to Westwego. The object of the steamship company returning to us the transfer slips was to designate the quantity of cotton they might want aboard a steamer and what particular cotton, at times. I have now described the course of business that was usually followed at Westwego during the months of October and November, 1894, as to your specific questions. I do not recollect receiving shortly prior to November 12, 1894, a letter from the Elder-Dempster Steamship Company in relation to the general method of the railway company handling cotton at Westwego. I will look among our files and give you any letter that we received from the Elder-Dempster Steamship Company during the month of November, prior to November 13th, 1894. Ordinarily, immediately
69 after the return of the transfer slips by the steamship company to the railway company, the railway company would make out an order on the Westwego office to deliver such cotton as the steamship agents ordered. It sometimes happened that when a steamship arrived it took different cotton than that which was mentioned on the transfer slip; we possibly had some cases where the steam-hip did not take all the cotton that was mentioned on the transfer slip. I do not recollect having any correspondence with the steamship companies shortly after November 12, 1894, in relation to a new contract.

After the receipt from the steamship company of these transfer slips with marks of lots of cotton upon them, if it should be necessary to get the cotton out, that would be attended to by some of the railway employees at Westwego, as to locating the cotton and getting it out. It was not necessary to get it out at all times; it was on the wharf; it was all over the wharf; it was usually stored inside of the railway track, toward the land. I do not know that I issued any specific order to any one in respect to getting out that cotton. It was understood we would get out cotton when necessary to do it. By getting out cotton, I mean trucking it from where it was originally stored on the wharf out, say, in front or near enough in front to enable the steamship people to get it out without having to go around other piles of cotton. When that was done at all, it was usually done after the receipt of the transfer slip from the steamship company. Whether it was done at all depended on the location of

the cotton on the wharf. In some instances it was done and in some instances it was not done.

Q. Do you mean that before the receipt of the transfer slips from the steamship company the cotton that was destined for a steamer was put between the wharf and the river?

A. No, sir; not necessarily. I simply mean that if cotton
70 which Elder, Dempster and Company, for instance, sent a steamer there to get, if it was where they could get at that cotton, if there was no obstruction of any consequence between where this cotton was stored that they went there to get and the ship's side, that, in that case, we had nothing to do in getting it out; they took it from where it was located. It was not necessarily gotten out by the employees of the railway company in the majority of instances after the receipt of the transfer slips from the steamship company. I do not think it was done in the majority of instances. I could not say how much of my time I spend at Westwego, probably not on the average an hour a day throughout the season. Sometimes, but not at that period, it would happen that I was not there for a week at a time. Take twenty days prior to November 12, 1894, I was probably there six or seven times in that period, maybe oftener. I could not say what was the average duration of my visits during that time. It may have ranged anywhere from half an hour or an hour up to three or four hours. I do not recollect specifically spending three or four hours at Westwego at any time in the three weeks prior to November 12, 1894. I was at that time a very busy man; that was at the height of the cotton season; and during that cotton season a very large crop had been produced; the railway company was receiving a very large number of bales of cotton at that time. I have not figured up how many bales of cotton were unloa led from the cars at Westwego between the first day of September and the 12th day of November, 1894. The request as to that was made from the 1st to the 12th of November, and I have that here.

Q. State to me how many between the 1st and 12th of November.

A. I can give it to you as to dates.

Q. Yes, and will you add to your answer stating that you are now refreshing your recollection and referring to whatever you have before you; what do you call that?

71 A. These are tissue copies of daily reports made to me by the Westwego office. On November 1, 1894, we unloaded on the wharf 1,692 bales of cotton. The report which I now produce, and which runs from November 1st to the 12th of November, inclusive, gives all the information which I received at that time on the subject. The daily report of the 12th of November, 1894, shows that there were on that date on hand in cars at last report 145 cars carrying 5,245 bales of cotton; and there were received on November 12th 65 cars with 2,760 bales in them. There were on hand at the close of the day's business, apparently, from that, 210 cars; there were none unloaded on the 12th; and there were on hand that night 206 cars with 8,000 bales in them; there were on the dock

that night 20,879 bales; there were none loaded on the steamship that day; the total receipts "this season" were 64,316 bales, and the total delivered on steamships 34,764 bales. The reference at the end of these daily reports concerning insurance reports is to the number of bales on hand consigned via each particular line. It is called an insurance report for the reason that we telegraph our auditor in Dallas, Texas, each day as to the number of bales of cotton on hand; I do not know for what purpose; I have never heard; I presume it had some connection with the matter of insurance, I do not know; the report that was sent on November 12 to our auditor at Dallas, Texas, was sent from the Westwego office; I don't know whether or not I have a letter-press copy of it; I have here the letter-press copy book that we kept at Westwego; that report being a telegraph report, I do not know that it would be copied in my office record book.

Q. Just let me examine your letter book.

Mr. TAGGART: No, we won't let you examine the letter book. Look, Mr. Miller, and see if there is any on the 12th.

(The WITNESS:) That would not ordinarily be kept here,
72 I should not imagine; that was in the nature of a telegram, and the telegraph office was located up in the elevator office. I expect, however, that this is it.

Mr. CLEVELAND: Let me look at it.

Q. You produce letter book, which will be marked for identification "Plaintiff's Exhibit 49," and you refer me to page 310 of this letter book?

A. Yes, sir.

Q. Which reads: "C. G. Miller, New Orleans, La., Westwego office, 11/12/94, R. Fenby, Dallas, on wharf tonight 250 bales local cotton; 21,448 bales through cotton; 125 sacks C/S cake;" and these are your initials?

A. Yes, sir; it is signed by Mr. Figures. That is a sample of the telegrams that were sent daily by the Westwego office to Mr. Fenby at Dallas, so that he knew exactly what cotton we had on hand every day. Letter-press impression of the daily report of the 10th of November was designated as a cotton report, and it is as follows: "On hand in cars last report, 114 cars, 4,164 B/C; received today, 18 cars, 589 B/C; unloaded today, 8 cars, 274 B/C; on hand tonight, 124 cars, 4,479 B/C; delivered to steamships today, none; total receipts this season, 60,765 bales; total receipts last season, 45,033 bales; total increase this season, 15,732; total delivered steamships this season, 34,764; forwarded to New Orleans, 668 bales. Insurance report: steamship, 9; destination, on the cars." Immediately after the words "on the cars" it is indistinct; but it looks more like 125 cars than anything else. The numbers under the heading "Insurance reports" are so blurred that I cannot read them. The names of the steamship lines are in the same order as the report of November 12. The destination in the same order as on November 12th, and under the heading "On cars" opposite "Havre," 4,081; opposite "Liverpool," 314 bales; opposite "Harrison line, Liver

pool," nothing; opposite "E. D. line, Bremen," 84 bales, and
73 local, 250. The report of November 12, 1894, states that we unloaded no cars on that day; I know nothing to the contrary of that. The report of November 10th says we only unloaded eight cars on November 10th, which was Saturday; I know nothing to the contrary of that.

Q. Mr. Miller, what is the first subject that you have examined and prepared for me?

A. You wished to know the number of bales delivered to each steamer from November 1st up to the 12th. This appears on the second sheet of these daily reports that I have produced. I have the cotton book here that we kept at Westwego and the data here from start to finish respecting the 200 bales of cotton under Bonham bill of lading 35; the two large books that are now here I call the cotton books at Westwego.

This cotton book, which will be called No. 1, is labeled on the outside "Record, through cotton shipments, Texas & Pacific Railway Company," covering Havre and Liverpool, and is marked for identification "Pl'f Ex. No. 50." The system under which this book was kept is this: On the arrival of the waybills accompanying the cotton, the billing was entered up in this book. The first bill of lading which is shown me, No. 35, appears, as to the entries relating to it, in Book No. 2, marked for identification "Pl'ff Ex. No. 51." On folio 6 appear the following entries which relate to this bill of lading. In the first column headed "Date" is the entry showing the arrival of the cotton covered by Bonham B/L No. 35, at Westwego. In the column headed "Waybill date" shows the date of the billing of the waybills issued at Bonham, Texas. In the column under the heading of "Waybills" shows the numbers of those same waybills. Under the heading of "Initial" shows the initials of the cars carrying the cotton. In the column under the heading "Car numbers" shows the number of those same cars. In the column
under the heading "Where from and consignor" shows the
74 point of origin of the cotton. In the column under the heading "Consignee and destination" shows the consignee and destination of the cotton. Column under the heading "Steamship line, vessel" shows the steamship line via which the cotton was to go; and column under heading "B/L No.," shows the numbers of bills of lading issued to cover the cotton in question. In the column under heading of "Bales of cotton," shows the number of bales covered by each bill of lading. In the column heading of "Date of sailing," that is blank. The column under the heading "B/C" (meaning bales of cotton), shows the number of bales of cotton of the respective marks. In column headed "Marks," shows the marks of those same bales. Column under the heading of "Notice," shows the post number nearest which the cotton is located after being unloaded. Column under the heading of "Exceptions" is blank. The column under the heading "Pro. No." (which means "progressive number") represents the number of the skeletons taken from the original billing accompanying the cotton. So we have the column under the general head of "Delivery," subdivided into

three headings—number of bales signed for, dates and vessels. All these three columns, under the general column of "Delivery," are blank, except as filled in with red ink after the fire, showing that the 200 bales of cotton covered on Bonham bill of lading No. 35, were burned on the wharf. Then also, in the column headed "Remarks," there are no remarks opposite this lot of cotton. As to each lot of cotton received at Westwego, there should be the same particulars in one or the other of these cotton books, Nos. 50 and 51. By "Pro. No." I mean "progressive number," it is a term we use indicating a consecutive number of any particular lot of documents, commencing, say, at No. 1, and numbering consecutively from that up. Under the general column headed "Delivery," where there are these three subsidiary columns, first is the number of bales of cotton signed for; that means the number of bales of cotton signed
75 for by the steamer; the next column headed "Date" shows the date on which those mate's receipts were signed; and the column headed "Vessel," the vessel that took the cotton. I have not made up a general statement as to each one of these lots of cotton involved in these 43 suits; but I have the waybills and transfers and skeletons covering each lot; I produce the waybills for this bill of lading No. 35; I don't remember whether we have the transfers for this bill of lading.

Q. We will follow this general lot of cotton through all its ramifications.

A. The papers which I produce, and which are numbers 869, 870, 871, 872, 932, 933, 940, 1031, 1032, 1033 and 1034, are used as skeleton waybills; they are all skeletons made from the original waybills at Westwego. The object of making those is to enable the check clerks to have documents from which to check cotton out of the cars; the particulars are then entered in the cotton book. The skeleton waybills are then turned over to the check clerks for use in checking cotton from cars discharged at the time as they get ready to unload the cotton. After the cotton is checked out of the cars the check clerks sign them, sign their name, placing "O K" on each above their name, and show the post number near which the cotton is posted or placed on the wharf. Taking up Exhibit No. 52, it shows that 25 bales of cotton marked "P. C. U. P." were placed under the direction of Webb near post 28 and checked by Webb "O K." The skeleton waybill is made in the office by some of the clerical force before the check clerks get it.

Q. How is that? On this exhibit, judging from the writing, it was made out after the cotton was placed at post 28?

A. No, sir.

Q. Then the words on this Plaintiff's Exhibit No. 52, "O K," "Webb," were placed on this after it had been made out by the clerk in the office at Westwego?

76 A. Yes, sir.

Q. And after it had been checked by Mr. Webb from the car?

A. Yes, sir.

Q. And was it all copied at one time?

A. This particular waybill, I think, was all copied at one time. It has that appearance. In some instances, though, it may have been copied before getting to the check clerk. In that case the check clerk's "O K" would not have been copied at all, and this appears to have been copied. After the check clerk had checked this cotton out, the skeleton waybills were turned in again to the Westwego office, and forwarded by that office down to my office at the foot of Thalia street, New Orleans, and that is where they remained. I do not find that we have the original transfer sheets for these 200 bales, but we have the impression copies of them.

Q. Please produce those.

A. The first is transfer No. 1197, showing practically about the same reference as is shown by the original waybill that accompanies the cotton. In my office at New Orleans there were made out transfers. These are contained in a book which is called "Foreign Cotton Transfers, No. 936 to 1947, No. 2, 1894–1895." It is a book of yellow tissue sheets not paged, and these transfer sheets relating to this cotton are as follows: 1197 and 1198, and also Nos. 1320, 1199, 1200, 1265, 1266, 1308, 1317, 1318, and 1319, contained on different pages of this transfer book. Transfer No. 1197 reads as follows: "Elder, Dempster & Company. The Texas and Pacific Railway Company. Memorandum of freight transferred and delivered to the railway Westwego station this 23d day of October, 1894, in good order and condition, noted to be forwarded as indicated hereunder." Then in the column under the general head of "Waybill" and under the specific heading of "Date" is shown the following dates, "10–15," and below that "10–18." Under the
77 same general heading and under the specific heading of "Number" shows the number "212," which is the waybill number, and No. 349 also the waybill number. In the column headed "Car No. & initial," shows No. "6564, T. & P.," which is car number and initial. In the column headed "Expense bill No." shows Nos. "8008 and 8010." In the column under the heading of "Where from and shippers," shows "Bonham, C. & Co., Ho. Grove" (for "Honey Grove"). In a circle in the column "Transfer No." shows "No. 869," which is the Westwego pro. number as well as the skeleton number. In column under the heading of "Consignee and destination" is shown "O. N." meaning order to notify Newell & Clayton, Liverpool, England. In the column under the heading of "Articles," is shown 25 B/C "P. C. U. P.," B/L No. 35, 200, contract 44." In the column under the heading of "Weight" is shown weight 12,500 lbs. In the column under the general heading of "Rates" and under the specific heading of "Through" is shown 51.79; under that "10 cents" and under that "49.21" making 1.11 through rate. In the column headed "Freight" is shown $64 74, which is the inland proportion of the revenue for transporting the shipment. Under the column headed "Charges" is shown $12.50, which is the advance or compress charge paid out and covered by the waybill previously described as being No. 349 from Honey Grove. In the column under the heading "Total to pay" appears the amount $77.24, which is the

total inland charges following the shipment, for compressing and transportation. In the column "Prepaid" nothing.

Q. What is this division of rate—51.79–10–49.21?

A. 51.79 is the railroad's proportion of the through rate 111; 10 is the compress charges of 10 cents per hundred, and 49.21 is the steamship proportion of the through rate—the ocean proportion of the through rate of 111; and the 64.74 is made up of the revenue of the inland carrier, that is, the railroad carrier, for transportation on the basis of 51.79 for 100 pounds. There is nothing on any
78 of these transfer sheets to show when they were sent, if ever, to the steamship company.

Q. You can't tell me, then, whether there were ever sent to the steamship company any of the transfer sheets relating to this 200 bales?

A. I can't tell you from these sheets, but I have other documents to show that.

Q. Show me those other documents, please?

A. By referring to a letter-press copy book, "Foreign cotton transfers to steamship agents, season of 1894–1895," unpaged, I find that on November 2, there were sent to Elder, Dempster & Company, at New Orleans, this and all the other transfer sheets which accompanied this lot of cotton of 200 bales: "The Texas & Pacific railway; office of freight agent; New Orleans, November 2, 1894; Elder, Dempster & Co., city; below please find transfer of cotton consigned via your line to Liverpool, England;" and this letter consists of four letter-press pages and is signed, "Yours truly, C. G. Miller, freight agent, Shelly," and includes all the transfers which I have mentioned; namely, 1197, 1198, 1199, 1200, 1265, 1266, 1308, 1317, 1318, 1319 and 1320, as well as various other transfers. (The book containing transfer sheets is marked "Plaintiff's Exhibit No. 63." The transmittal letter book is marked "No. 64." The letter of Nov. 2, 1894, is marked "No. 65)." The waybills, skeleton waybills and transfer sheets and letter of transmittal complete the documents in relation to this 200 bales of cotton, with the addition of the ship's copies of the bills of lading. I produce now what we call our ship's copy of the bill of lading. The record also leads through the cotton book in the New Orleans office, the same book I had down here the other day. I am prepared to show you a complete record also from that book. I refer to Plaintiff's Exhibit No. 36, the book which was kept in the office at New Orleans. On page 90 thereof are entries which relate to this 200 bales of cotton. I read entries on one side of that book the other day. I have found that the entry
79 of "M. R.," meaning "master's receipt," in the column headed "Disposition, Bs/L," on page 90 of this book, was occasioned by the practice of making up master's receipts after the receipt o after the arrival at my office from the ship's copies of the throug bills of lading, the entry of "master's receipts" this referred to bein made on page 90 to indicate that the master's receipt had been made up from the ship's copies of bills of lading covering the 200 bales of cotton from Bonham, B/L No. 35, Contract 44, the custom being to make up the master's receipts and send them with the ship's copy

of the bill of lading to the steamship agents, without regard to the time of delivery of the cotton, or whether the cotton is delivered or not. In a number of instances prior to the delivery of the cotton, as was the case in connection with these 200 bales, on pages following page 90, will be found other entries as to records and disposition of these 200 bales. This column headed in red ink "T. R. F." means transfer sheet, and the number in that column below that heading gives the numbers of such transfers. For instance, on page 93 I find transfer No. 1198—that is, I find transfer sheet No. 1198—which covers 25 bales, marked "P. C. U. P.," from the lot of 200 from Bonham. In the column headed "Number and date of notice" appears the entry of October 23d, which indicates that a transfer sheet, No. 1198, was made out on October 23d. In the column under the heading "Name of vessel" appears the stamped endorsement "burned at Westwego, November 12th, 1894." Under the column headed "Date received," on page 93, it is blank. Also blank under column "Date served on steamship," "Date returned by steamship," "Name of vessel," original clerk—now "burned at Westwego, November 12, 1894." Also blank under the column headed "Notice, returned to New Orleans agent." My books contain the same character of waybills, skeleton waybills, transfer sheets, and such
80 other transfers, entries in the cotton book, entries in the contract foreign cotton book, and the same data with reference to other bills of lading involved in these transactions as I have stated with reference to bill No. 35. This indicates the system of handling the cotton. The master's receipts indicated on page 90 concerning this lot of cotton mentioned in the bill of lading No. 35 were never in fact signed by a master; they were simply blanks made up to suit some steamship which would arrive and take the cotton. I do not know where the master's receipts are which were made out for this lot of cotton. At that time they were in the hands of the steamship agents, sent there and retained. All these particulars were gone through with concerning this 200 bales under contract with the steamship company No. 44. Our ship's bill of lading which has been marked "66" has the name of J. M. Booth signed to it; he is shown there as agent of the Texas and Pacific Railway Company at Bonham, Texas. I do not konw him to be such; I do not know the man. I know that the company had an agent by the name of J. M. Booth at Bonham, Texas. As to whether I was in the habit of receiving from time to time bills of lading so signed from Bonham, Texas, I will say that the bills of lading were not transmitted to me direct from the stations at which they were issued. The bills of lading reached me through our general freight office at Dallas, Texas. I was in the habit of receiving from our general freight office at Dallas, Texas, bills of lading signed by J. M. Booth, and dated at Bonham, Texas.

Q. Now, Mr. Miller, you recollect you were to prepare something else for me, were you?

A. The number of bales burned on the wharf; you wanted to know as to that.

Q. The book which you now produce and which is labeled "Texas

& Pacific Railway Company, Westwego, La., Nos. 1547, 1101, to 2347, 11/28/94," also "Statement of cotton burned in cars on wharf, November 12, 1894," is what?

81 A. That is a book of skeletons from June 14 to October 29, 1894 (marked "Plaintiff's Exhibit 68").

The book I now produce is a similar book; it contains copies of the skeletons from October 22, 1894, onwards.

Marked "Plaintiff's Exhibit No. 69."

I also produce book containing letter-press copies of numbers of transfer sheets, No. 1 to No. 935.

Marked "Plaintiff's Exhibit No. 70."

Also another book containing letter-press impressions of transfers Nos. 1948 to 2935.

Marked "Plaintiff's Exhibit No. 71."

I also produce another book containing record of ship's copies of bills of lading, marked on the outside, "Foreign cotton bills of lading, season 1894/1895."

Marked "Plaintiff's Ex. No. 72."

I also produce two memorandum records of transfers made, per this, by the cotton clerks at Westwego.

Marked Plaintiff's Exhibits # 73 & # 74.

I also produce a package of what we call "switch lists;" that is, conductors' lists, a printed form showing what cars each conductor left at Westwego junction. The switch list was left at Westwego junction. This list shows the date the cars were sent out, the train number that brought the cars in and the name of the conductor.

Marked "Plaintiff's Exhibit No. 75."

I have some letter books also that contain letters of various import, private affairs of the company that we would not like
82 to have examined promiscuously. This is a letter book from January 16, 1894, to February 13, 1894.

Marked "Plaintiff's Exhibit No. 76."

There seems to have been some of our office letter books, from February to September, not brought down; I do not find them here. For instance, the last date shown here is February 13, 1895. The letter book between that date—February 13 and September 21—don't appear to be here. The first book I have here runs from September 21, 1894, to October 9, 1894.

Book marked "Plaintiff's Exhibit No. 77."

Then we have a letter book from October 10, 1894, to October 29, 1894.

Marked "Plaintiff's Exhibit No. 78."

Then from October 29 to November 17, 1894.

Marked "Plaintiff's Exhibit No. 79."

These letter books that I have produced are New Orleans letter books. We have a book in our cotton office at New Orleans from February 16, 1894, to December 28, 1894, which is a New Orleans letter book also.

Marked "Plaintiff's Exhibit No. 80."

We have claim letter book from November 8, 1894, to December 20, 1894.

Marked "Plaintiff's Exhibit No. 81."

Also claim letter book from December 18, 1894, to January 11, 1894.

Marked "Plaintiff's Exhibit No. 82."

Then we have an impression copy of orders gotten out at
83 the New Orleans office on the Westwego office ordering certain cotton delivered to steamships at Westwego from September 27, 1893, to January 25, 1895.

Marked "Plaintiff's Exhibit No. 83."

This last letter book I have shown you, or the letter-press impression book, contains orders from our New Orleans office to the Westwego office to deliver certain cotton to steamships; the Westwego office was guided by the directions contained in these various letters, but not necessarily guided by them alone; there may have been other instructions not embodied in these orders; I do not know of any. It was the object of this book to keep a record of the orders that were sent out from our New Orleans office to the Westwego office, directing shipments of cotton, so far as orders contained in that particular book are concerned. We intended to have a record of every order.

Q. Have you had leisure since the morning session to search for that letter from Elder, Dempster & Company during the first 12 days of November, 1894?

A. No, sir.

Q. Please make a memorandum of that.

A. I would say in connection with this other correspondence that you referred to today, with steamship agents, as to a new form of contract of delivery, I am positive that we had no such correspondence, without digging through the letter books. I have been thinking of that considerably.

Q. Prior to November 12, 1894, how many bales of cotton under contract No. 44 had the Texas and Pacific shipped on steamers of the Elder, Dempster & Company line for Liverpool, England—I mean during the months of October and November?

A. I don't recollect as to how many bales had been shipped.

Q. You have material here from which you will be able to answer.

84 A. Our contract book may show that. I have all of our contracts here which I was to prepare, and have looked them over to see whether there were, prior to November 12, any contracts where the delivery was in any other form than unrestricted, or as in form of contract No. 44, and I find no others.

Cross-examination by Mr. TAGGART:

A. I have selected all the contracts with the steampship companies relating to the cotton covered in these forty-three suits and for the period during which the cotton moved.

Q. In some of the contracts which are produced under the head and marked I noticed under the head of Delivery "Unrestricted to a certain date." Would these words be understood as fulfilled if the railroad company had the cotton on the wharf about that date?

A. Yes. That was the understanding where there was a restriction to a certain or particular date that the railroad company should have the cotton unloaded on the wharf at Westwego about that day.

Q. Now, Mr. Miller, have you these skeletons which were produced yesterday respecting this first case—I want to call your attention to one matter in connection therewith?

A. I have these skeletons, and produce them.

Q. I call your attention to the marks on skeleton No. 869 under the column "Weight, rate, charges," and ask you what those indicate they are.

A. They are the marks—check-marks—made by the check clerk; marks indicating that one bale of cotton was checked out of the car. Some of the clerks entered on check-slips marked in that way, and kept the account in that way. On some you find no check-marks, or find check-marks in different places. On No. 872 is "O K;" that is a check-mark. It was not absolutely necessary to have the check-mark put on the skeleton. It was simply different method of keeping tally adopted by the different clerks. In this first case of Newell & Clayton I have had selected all the waybills
85 which relate to cotton claimed in that case, and I have had them checked to ascertain that they covered all the cotton. The number of the waybills covering this case are as follows: Bonham to New Orleans, waybill No. 558, dated October 25, 1894; Bonham to New Orleans, waybill No. 560, dated October 25, 1894; Bonham to New Orleans, waybill No. 592, dated October 25, 1894; Bonham to New Orleans, waybill No. 593, dated October 25, 1894; and from the same place to same on the same date I have waybills Nos. 590, 559 and 589, respectively. I further have the following waybills Nos. 588, 587, 556, 557, from Bonham, Texas, to New Orleans, dated October 25. I have waybills Nos. 234, 233, 231, 230, 236, from Bonham to New Orleans, dated October 16, 1894. I have waybills Nos. 211, 210, 212 and 213, from Bonham, Texas, to New Orleans, dated October 15, 1894; then I have waybills Nos. 232 and 235, from Bonham, Texas, to New Orleans, dated October 16, 1894; I also have waybills Nos. 462 and 463, from Bonham, Texas, to New Orleans, dated October 23, 1894; also waybills 502 and 535,

from Bonham, Texas, dated October 24, 1894. These waybills give the cotton involved in this particular case.

Waybills referred to are offered in evidence and marked "Defendant's Exhibit Z, Nos. 1 to 26 inclusive," which are attached hereto and made a part hereof (Exhibit Z 1 is printed at p. 149 *post*. The remainder are not printed; see stipulation, p. 155).

In this suit of Newell & Clayton against the Texas and Pacific have you the skeletons that relate to the cotton involved in this suit?

A. I have, and produce them. These are the skeletons which were selected on the demand of the plaintiff.

Skeletons referred to offered in evidence by the defendant
86 and marked "Defendant's Exhibit Z, Nos. 27 to 53 inclusive" (Exhibit Z 27 is printed at p. 150 *post*. The remainder are not printed; see stipulation, p. 155).

Q. Now, Mr. Miller, have you the original transfers relating to this Newell & Clayton case?

A. I have the originals in some instances and in other instances tissue copies. They are papers which were produced on the notice of plaintiff's counsel. I can give you the number of the original transfers as far as I have them. I have transfer sheet No. 1789, to Elder, Dempster & Co., dated November 1st, 1894, and I have transfer sheet No. 1792, to Elder, Dempster & Co., dated November 1st, 1894; then I have transfer sheets 1801 and 1800, dated November 1st, 1894, to Elder, Dempster & Co.; transfer sheet 2101, dated November 5th, 1894, to Elder, Dempster & Co.; transfer sheets Nos. 1795 and 1797, dated November 1st, 1894, to Elder, Dempster & Co.; transfer sheet No. 1802, dated November 1st, 1894, to Elder, Dempster & Co.; transfer sheet No. 1730, dated October 30th, 1894, to Elder, Dempster & Co., and transfer sheets 2070 and 1682, to Elder, Dempster & Co., dated November 5th and October 30th, 1894, respectively. These are all the orignals that I have.

The defendant offers in evidence the transfer sheets referred to, which are marked "Defendant's Exhibit Z, 54 to 64 inclusive." (Exhibit 54 is printed at p. 151, *post*. The remainder are not printed. See stipulation, p. 155.)

I have a memorandum of the numbers of the impression copies of those transfers relating to the cotton involved in this case which are missing. The numbers of such transfer sheets are as follows: 1197, 1320, 1198, 1199, 1200, 1265, 1266, 1308, 1317, 1318 and 1319, to Elder, Dempster & Co.; then also 1791, 1798, 1794, 1793, 1796, to Elder, Dempster & Co.

87 All of the above impression copies offered in evidence by defendant and marked Defendant's Z, No. 65 to No. 80, inclusive. (They are not printed. See stipulation, p. 155.)

Q. Now, Mr. Miller, can you give me a memorandum of the sending of the transfers relating to this case, to Elder, Dempster & Co.?

A. I can. The following transfer-sheet numbers were sent to

Elder, Dempster & Co., on November 2d, in a letter which is marked "Plaintiff's Ex. No. 65 for identification."

The letter in question (which was marked "Def't's Ex. Z 81") was read to the court as follows:

"Texas & Pacific Railway Co., office of freight agent, Liverpool.

"NEW ORLEANS, *Nov.* 2, 1894.

"Elder, Dempster & Co., city.

"GENTLEMEN: Below please find transfers for cotton consigned via your line to Liverpool, England:

1308	16	B. C. Bonham,	B. L.	35,	cont.	44.	
1197	25	"	"	"	"	"	"
1200	25	"	"	"	"	"	"
1199	24	"	"	"	"	"	"
1198	25	"	"	"	"	"	"
1265	25	"	"	"	"	"	"
1266	25	"	"	"	"	"	"
1320	3	"	"	"	"	"	"
1319	16	"	"	"	"	"	"
1318	15	"	"	"	"	"	"
1317	1	"	"	"	"	"	"
1798	18	"	"	"	29	"	"
1796	24	"	"	"	"	"	"
1794	24	"	"	"	"	"	"
1793	22	"	"	"	"	"	"
1791	12	"	"	"	"	"	"

* * * * * * *

"Yours truly, C. G. MILLER, *Fr't Ag't.*"

88 In a letter of November 9, 1894, to Elder, Dempster & Co., there *was* transmitted transfer sheets as follows: No. 1792, 1789, 1795, 1797, 1800, 1801, 2101 and 2355.

This letter (which was marked "*Nef* 't's Ex. Z 82") was read by defendant, and is as follows:

"The Texas & Pacific Railway Co., office cotton department, Liverpool.

"Messrs. Elder, Dempster & Co., agents, city.

"GENTLEMEN: Herewith please find T. F. R. S. for cotton consigned by your line to Liverpool, England. * * *

1792	13	B. C. Bonham,	B. L.	28,	cont.	44.	
1789	18	"	"	"	"	"	"
1795	3	"	"	"	"	"	"
1797	25	"	"	"	"	"	"
1800	7	"	"	"	"	"	"
1801	1	"	"	"	"	"	"
2101	25	"	"	"	"	"	"
2355	8	"	"	"	"	"	"

* * * * * * *

"Yours truly, C. G. MILLER,
"Ag't J. H. B."

Q. Mr. Miller, have you a record of the dates of the arrival of these various consignments of cotton at Westwego?

A. I have.

Q. And how would you get those?

A. By referring to the car-record book—that is a book showed the arrival of cars at Westwego.

Q. Then, if I understand you, when a train arrives at Westwego a record of the cars of which that train is composed is turned in by the conductor; is that right?

A. Yes, sir; and these waybills show the loading of each of the cars in that train. They show the contents in that way we would understand that a particular car brought a particular lot of cotton. This book which I have, and which I call the car-record book, contains a record of a great many cars aside from those containing these shipments. The only way in which I can ascertain the cars containing this particular cotton would be to take the waybills and ascertain their arrival from them by their numbers. This car-record book is a book which I produced on the demand of plaintiff's counsel, and which has been marked for identification "Plaintiff's Exhibit 9." There is but one of these books.

89

The defendant thereupon offers the entries in the book marked "Plaintiff's Exhibit 9," of cars identified by the numbers on the waybills already offered in evidence in this case. (Attached hereto and made a part hereof, marked "Exhibit Z," but not printed; see stipulation, p. 155.)

The method of ascertaining the date of unloading at Westwego would be by taking the skeleton sheets, and from them we would be able to ascertain the dates of the unloading of any particular cars. It might be possible that in some instances the dates of unloading would be omitted from the skeleton sheets. In that case we would get the date on which the skeleton sheets were transmitted from the Westwego office to my office in New Orleans. This would be found in the Westwego letter books transmitting them. That letter book has been offered for idenification, marked "Plaintiff's Exhibit 49," and the other is produced, which is marked "Defendant's 'Z' 1000." At this time I am not able to state just how many entries on the skeletons are lacking dates. There are a very few of them.

Q. Mr. Miller, after the delivery of these transfer sheets to the steamship agents were any of them in the habit of designating what particular lots of cotton they should take on particular steamers?

A. Yes, sir; that was done by returning the transfers to my office with a letter of transmittal, showing the total number of bales covered by the transfers returned, instructing that the cotton covered by these transfers be delivered to a certain steamer. In some cases where there were only a few transfers, the steamship agents at times would simply endorse on the face of the transfers instructions as to the delivery, returning the transfers. The method practiced with reference to giving steamers cotton not

90

named in the transfers, in case there was capacity in the vessel to receive it, was to give the steamships all the cotton they would receive and take on board, regardless of whether the cotton was covered by the regular transfer orders or not. I recognize a letter of November 6th, which you show me, and it is a letter from Elder, Dempster & Co., addressed to myself, dated November 6th, 1894, returning us transfers covering an order to deliver to the steamship "Leyden," then due at Westwego, 4,721 bales of cotton, ordering furthermore, that 342 bales short out of the steamship "British Crown," be likewise delivered to the steamship "Leyden" making a total of 5,063 bales in addition to that 200 bales they state in that letter were reported as being short out of the steamship "British Crown;" and if that proved to be the case to deliver these 200 bales to the steamship "Leyden."

The letter referred to (which was marked "Def't's Z 1005") was read by defendant's counsel and is as follows:

"Elder, Dempster & Co., steamship agents and brokers, Liverpool, Manchester, London, Hamburg, and New Orleans.

189 GRAVIER STREET,
NEW ORLEANS, *Nov. 6th*, 1894.

C. G. Miller, Esq., T. & P. R.:

Please have cotton as per enclosed transfers ready to deliver to S. S. 'Leyden' now due at Westwego, 4,721 bales. The following cotton shut out of the S. S. 'British Crown,' we would like delivered to 'Leyden;' also—

91

Cont.	43	B. ldg	38, G. L. O. W	1
"	51	"	3, P. M. D	1
"	"	"	2, O. D. H	25
"	"	"	7, D. Y. E. W	1
"	"	"	1, L. N. G	7
"	"	"	4, L. G. R	20
"	"	"	3, O. A. W	20
"	54	"	37, B. L. U	17
"	"	"	27, L. K. D	200
"	200	"	8, E. A. C. H	50
				342 bales.

"Total to Leyden 5,063 bales.

"The following cotton is reported to have been loaded on the 'British Crown.' If the cotton did not go on this vessel please deliver to steamship 'Leyden:'

Cont.	70	B. ldg.	41, T. C. A	50
"	54	"	54, D. I. F	50
"	63	"	34, C. Y. Z	100
				200 bales.

"Yours truly, p. pro ELDER, DEMPSTER & CO.,
"M. R. WARRINER."

Q. I notice this letter does not designate the numbers of transfers. What was the method of business at your office upon receipt of communications of that sort?

A. I took the transfers received with the communications and compiled a written order on Westwego, covering the same cotton as covered by these transfers.

Q. Have you the document which was transferred on the 6th or thereabouts of November, from transfers enclosed?

A. I have.

The document enclosed (which was marked "Def't's Z 1006") offered in evidence by the defendant, and reads as follows:

"Texas & Pacific Railway Company, notice No. O. G. M., 11/7/94, trip No. 17. New Orleans, Nov. 6th, 1894; S. S. Leyden, as
92 per letter from C. G. M. Nov. 7, 1894, the following-described cotton is now at this depot ready for delivery:

Manifest.	Expense No.	B. L. No.	No. B. C.	Marks.	Freight and charges.	Station and consignor.
1375	599	F. 38	14	E. N. N.	Terrell.	F. P. 972

Then follow three pages of similar matter, footing up 4,661 bales.

Q. I show you a letter of October 19th, and ask you what it is?

(The witness being shown the document answers:)

A. It is a letter from Elder, Dempster & Co. announcing to my office transfer for 2,430 bales of cotton to be delivered to the steamship "British Crown" for Havre.

Defendant offers in evidence the letter (which was marked "Def't's Z, 1007), and the same reads as follows:

"Elder, Dempster & Co., steamship agents and brokers, Liverpool, Manchester, London, Hamburg and New Orleans.

189 GRAVIER STREET,
"NEW ORLEANS, *October 19th*, 1894.

"C. G. Miller, Esq., general agent T. & P. railroad.

"DEAR SIR: Enclosed please find transfers for 2,430 bales of cotton, as follows:

"Contract 16, 50 bales. Contract 34, 200 bales.
" 43, 650 " " 51, 295 "
" 54, 785 " " 60, 400 "
" Cotton belt contract 10, 50 bales.

93 "These are all the transfers we have in our possession.
"Please deliver the cotton to the S. S. 'British Crown' for Havre.

"Please hurry all master's receipts; we are still short of some for the S. S. 'Imaum.' We are informed this morning that 450 bales for which we sent you transfers were not delivered to the S. S. 'Imaum.' Please return us transfers and master's receipts which are already signed for these lots. We will return the former and alter the latter.

"Transfers for 451 bales delivered to the S. S. 'Imaum' were handed to a clerk from your office this morning, but we are short of some of the master's receipts. Kindly let us have them as soon as possible.

"Yours truly, ELDER, DEMPSTER & CO.,
"Per pro M. R. WARRINER."

Q. I notice, Mr. Miller, in this the following language: "Please hurry all master's receipts. We are still short of some from the steamship 'Imaum.' We are informed this morning that 450 bales, for which we sent you transfers, were not delivered to the steamship. Please return us transfers and master's receipts, which are already signed for these lots." What did they mean by the statement that the master's receipts were already signed for bales of cotton not delivered to the steamship?

A. They mean that they had signed the master's receipts and delivered same to us for the quantity cotton therein mentioned, 450 bales, which had not been taken aboard the steamer "Imaum."

Q. Was that customary in dealing with the steamship company that master's receipts were signed regardless of the particular time the cotton was put aboard the ship?

A. I do not know as to just what particular time they did sign the master's receipts.

94 Q. Would not this indicate that they had signed them without regard to the actual putting of the cotton aboard the vessel?

A. Yes, sir, it would.

Q. I show you a letter of October 18th, and ask you what it is?

A. That is a letter from Elder, Dempster & Co., addressed to Mr. Wilkinson, our chief clerk at Westwego, informing him, in effect, that the steamship "Merrimac" would drop down from Southport at noon on the 19th.

Q. I just asked you whose letter it was?

A. It is a letter from Elder, Dempster & Co.

Letter in question (which was marked "Z 1008") read by defendant's counsel and the same is as follows:

Memorandum.

NEW ORLEANS, 18 *Oct.*, 1894.

From Elder, Dempster & Co., 189 Gravier street, telephone 1127, Liverpool, Manchester, London, Hamburg, to Mr. Wilkinson, T. & P. Westwego.

DEAR SIR: We are arranging to complete Bs/lg. on "Merrimac" by having her drop down from S'port at noon tomorrow. Let her complete Bs/lg. and give her also as many complete lots for L'pool as she may need to work the balance of the day.

Yours truly, p. pro ELDER, DEMPSTER & CO.,
M. R. WARRINER.

Q. Can you tell me why that letter was addressed to Mr. Wilkinson?

A. The matter of ordering cotton to that particular steamship was not handled through my office. The custom was that the Westwego office would not necessarily confine the delivery of the
95 cotton to steamships to orders sent from my office, in the form that has just been exhibited in connection with the steamship "Leyden."

Q. That is, if I understand you, Elder, Dempster & Co. did in some cases send a steamer direct to Westwego, and give directions direct there—not through your office—as to the loading of that particular steamer?

A. As to some portions of the loading. Elder, Dempster & Co. might communicate with or telephone to the Westwego office to give a steamer all the cotton she would take, over and above what had been regularly ordered, if any, through my office, or the officers in charge of the steamer might inform our representative at Westwego that they would take all the cotton we had on the wharf over and above what was ordered, or my office might have given the information to the Westwego office, obtaining it from Elder, Dempster & Co.

Redirect examination by Mr. CLEVELAND:

Q. I noticed that during the examination, Mr. Miller, you handed to your counsel certain papers. What are they?

A. Orders from Elder, Dempster & Co. for cotton delivered to the steamship "Leyden."

Q. Will you produce those for me?

The witness produces the orders referred to.

Q. It consists of a letter dated November 12th from Elder, Dempster & Co., or a copy of a letter dated November 12th, from Elder, Dempster & Company to yourself?

A. Yes, sir; together with certain transfers.

Q. Where is the original letter of November 12th, of which this letter is a copy?

A. The original letter has been mislaid. I obtained this copy

from Mr. Warringer, the agent of the Elder, Dempster Company.

96 Q. Where is Elder, Dempster & Company's wharf, or where was it in November and October, 1894?

A. One wharf they were using was the Westwego wharf, belonging to our company. They were using another wharf in the city.

Q. Where was the Elder, Dempster & Co.'s wharf was my question, Mr. Miller, if you know?

A. They were using two wharves; they did not own any wharf that I know of.

Q. Where was the wharf they used?

A. They were using a wharf on the city front immediately above Jackson street, as I recollect, in the city of New Orleans.

Q. It was generally known as Elder, Dempster & Company's wharf, was it not?

A. I think so; yes, sir.

Q. Will you produce, please, for me, any other written order by the Messrs. Elder, Dempster & Co., or any agent of theirs, to Mr. Wilkinson, or to any other person than yourself, relating to the loading of any cotton on any vessel during October and November, 1894, than the one marked "Z 1008," which has been read, if you have such?

A. I have no such. I do not know whether I have any more or not. I do not recollect any more than this.

Q. What other variations from the custom which you described on your direct examination do you know of than the exception which seems to be included in "Z 1008"?

A. Well, the officers of the steamships at Westwego would at times inform Mr. Wilkinson, or our Westwego employees, that they would take a certain number of bales of cotton. Elder, Dempster & Company might afford the same information to Westwego, or my office might afford the same information to Westwego, over and above the amounts specifically mentioned in the written order from Elder, Dempster & Company.

97 Q. That additional amount was to replace an amount mentioned on the transfers, which they may receive or that was not convenient. Was that not right?

A. No, sir; not exactly.

Q. Do you know of any other reason for taking such an additional amount not mentioned on the transfers, than simply because it was not handy to get out?

A. At the time that Elder, Dempster & Company would order a steamer to Westwego, we might have, say (for which Elder, Dempster & Co. held transfers) 2,000 bales, or the steamer might have room for, say, three or four thousand bales; then the Westwego office would be informed—from one of the several sources or probably several sources—that they might deliver to that steamer up to 3,000 to 4,000 bales in case they should have that amount there, or in case it would arrive during the time the steamer was loading. That occurred at times.

Q. Do you know of any instances of that occurring. If so name it?

A. I do not recall any specific instance of that occurring where subsequent arrivals made it necessary to observe that practice. I recall in a general way that that practice was observed, and we have had such instances. Those instances were not contrary to our usual practice. That was the practice under those circumstances.

Q. The usual practice, as I understood you to say in your direct examination, was to transfer to the ship such cotton as you had orders for to deliver to such steamship from Elder, Dempster & Co. Is that the fact?

A. That is the fact, yes, sir.

Q. In what instances, within your knowledge, were there variations from that custom?

A. In the instance of the steamship "British Crown;" some cotton was delivered to the steamship "British Crown" that was not ordered by Elder, Dempster & Company; some cotton that was ordered was not delivered.

Q. That is, shut out, as you call it?

98 A. Yes, sir.

Q. Why was it shut out, do you know?

A. The explanation being, as I recollect it, that Westwego was given to understand, or was under the impression, that the "British Crown" would at that time take more cotton aboard than was called for on the order from Elder, Dempster & Company. The cotton was shut out because the arrangement was not carried out. That is, the steamer filled up before all the cotton was placed aboard. Probably, couldn't carry as much as she figured on carrying.

The defendant offers letter of Elder, Dempster & Company of November 12th, 1894, reading as follows (Pl'ffs, 98):

Elder, Dempster & Co., steamship agents and brokers, Liverpool, Manchester, London, Hamburg, and New Orleans; telephone, 1127.

189 GRAVIER STREET,
NEW ORLEANS, *November 12th*, 1894.

C. G. Miller, Esq., T. & P. railroad.

DEAR SIR: Enclosed please find transfers for the following:

	Contract No.	16	50	bales.
	" "	60	500	"
	" "	67	150	"
	" "	73	200	"
	" "	79	100	"
C. B.	" "	10	50	"
C. B.	" "	33	61	"
	" "	54	200	"
	" "	63	1,330	"
	" "	70	725	"

99

	Contract No.	78.....	100 bales.
	" "	205.....	100 "
C. B.	" "	28	206 "
	Total	....	3,772 bales.

which please deliver to S. S. Leyden.

Yours truly,

—— ——.

Q. Do you know of your employés at Westwego ever allowing a bale of cotton going aboard a steamship without a mate's receipt for it?

A. No, sir; I do not recall any such instance. I have known of mate's receipts being given for cotton that did not actually go on board the steamship of which such mate was an officer.

Q. Is that the case in relation to the master's receipt which had been given concerning the steamship "Imaum" mentioned in Z 1007?

A. Not that I know of. I judge that was a case where the mate's receipts were not given.

Q. Explain to me a little further what is meant by these words: "Please return master's receipts for these lots."

A. That Elder, Dempster & Co. issued and signed master's receipts and delivered them to us for certain cotton which they afterwards discovered did not go aboard the steamer.

Q. Have you a certain mate's receipt or master's receipt for any cotton mentioned in any of the 43 suits in question?

A. We have, that I know of, one mate's receipt and one master's receipt for 50 bales of cotton that was not here at the time of the fire, and was, subsequently, delivered to the steamship "Mexico;" I refer to the case that we had in hand this morning.

Q. You are now referring to the 50 bales covered by Exhibits Z 1001 to Z 1004?

A. Yes, sir. Those 50 bales were not here at the time of the
100 fire. They subsequently arrived and were delivered to Elder, Dempster & Co. They are involved in the Leach, Harrison & Forwood suit, I believe. I have another instance here, which illustrates the practice that I just outlined awhile ago, as to cotton taken by steamers not on the orders which my office sent to Westwego. In this instance the steamship "Montezuma," Elder, Dempster & Company, my office, in a memorandum to Mr. Wilkinson at Westwego—directed that we deliver to the steamship "Montezuma" cotton on hand in excess of the cotton ordered. This is a direction from one office to the other. Now, the exception of the transaction shown by this exhibit marked "100," and the transactions shown by Exhibit Z 1008, I do not recollect specifically any other similar practice. These two instances were in line with the practice recognized at that time. That practice was, in case a steamer should go to Westwego with room aboard and wanted to receive from three to four thousand bales, and we should have, say, only 2,000 bales at the time the steamer reached Westwego, the

2,000 being regularly ordered by the steamship agents, the practice and the understanding was, that the Westwego office would deliver any cotton in excess of the 2,000 bales that they might have or that might arrive after the steamer reached Westwego, or after the regular order was given from Elder, Dempster & Co. It was not ordinarily the custom to take anything but complete lots. I may have other letters from Elder, Dempster & Co. during the last half of October or the first twelve days of November, 1894.

A. I may have; I have none here. I have some daily reports for October, 1894. I find my file is incomplete, I have probably but half of them here. I think they cover 15 days in the latter half of October. The file is complete from the 15th of October, that is, practically so. There may be one missing. I do not know whether we have what we call the ship's bills of lading for all the lots of cotton mentioned in any of the suits. We would have some. I do not know whether we have all or not.

101 Recross:

Q. You were inquired of respecting Elder, Dempster & Co.'s wharf in the city of New Orleans. Was it the custom of the Texas and Pacific Railway Company to ever deliver cotton to Elder, Dempster & Co., at that wharf?

A. At times.

Q. What kind of cotton or nature, or sort of shipments, were delivered to Elder, Dempster & Co.'s wharf in New Orleans?

A. Practically the same class of cotton as that we were handling at Westwego; but it was not the custom to make deliveries at that wharf of Elder, Dempster & Company in the city at that time. At that time we were handling their business at Westwego, and we had been handling it at Westwego, probably for a month or a month and a half, previous to the fire, as to that particular season of 1894–'95. It had been so handled also the previous season at Westwego. There was no other recognized place of connection between Elder, Dempster & Co.'s line of steamships and the Texas and Pacific Railway Company than Westwego, at and prior to the time of the fire.

By Mr. CLEVELAND:

Q. Was no cotton delivered at Gouldsboro?

A. No, sir. Cotton delivered to Elder, Dempster & Co. at their wharf at New Orleans was drayed to the dock by the Texas and Pacific from our warehouses and depot at New Orleans. In the season of 1894–'95 some cotton was delivered by the Texas and Pacific Railway Company to Elder, Dempster & Co. at their dock in New Orleans.

A. I do not remember of any cotton delivered by the Texas and Pacific Railway Company to Elder, Dempster & Co. at their dock at New Orleans in the season of 1894–'95. I do not say positively that there was none during the season of 1893–'94; there may
102 have been some cotton delivered to Elder, Dempster & Co. at New Orleans; I do not remember specifically as to that.

The defendant also offered the deposition of GEORGE W. ROTH, who testified as follows:

I reside in New Orleans; my business is superintendent at Westwego. I have been superintendent of the elevator part since July, 1892. Since January 1st, 1895, I have been superintendent of the wharf. In November, 1894, I was on duty there as superintendent of the elevator.

Q. Will you look at this which I show you and state what it is?

A. It is a port regulation for Westwego.

Q. From whom did you receive that?

A. From Mr. Cope, president of the board of harbor masters. Mr. Cope, Mr. Fitzgerald and Mr. Dean were the parties who brought it to me at Westwego. They stated when they brought it that I was to be the sole judge of what right one ship would have over another in the movement of vessels in the absence of the harbor master. This resolution was adopted January 10. I could not say exactly what the time was they brought it over. It must have been probably two or three days after that date, in the year 1894. There was no writing given by them to me evidencing my authority to act for them. They simply mentioned this tenth clause. They said I was to act and be their agent there. And these gentlemen were the harbor masters, and Mr. Cope was the president, and this is the paper which they furnished me.

Defendant also offered the deposition of EDWARD L. COPE, who testified as follows:

I reside in the city of New Orleans; I am deputy commissioner and superintendent of the port of New Orleans at present. In 1894,
I was harbor master and president of the board of harbor
103 masters at that time. I am now deputy commissioner. By
act No. 70, of 1896, there was a port commission created which superseded the board of harbor masters. I have custody of the records of the board of harbor masters for 1894, and they are still in my possession. I have the proceedings of that board of the 10th of January, 1894.

The book produced.

This is the record to which I refer of the board of harbor masters. The record of the meeting of January 10th, 1894, is as follows:

"Board of harbor masters, port of — Orleans.

"The meeting was called to order by the president and the following members were present: Edward L. Cope, Jno. J. Fitzgerald, E. D. Dean and John Davidson; absent, Geo. Buchert. The object of the meeting was to adopt rules and port regulations to govern Westwego. The following rules and port regulations were unanimously adopted:

"First. The harbor master has authority by law to regulate, moor and station all vessels at the wharf and to remove them from time to time to make room for others, and the degree of accommodation

which one vessel shall afford to another the harbor master is constituted sole judge.

"Second. Vessels coming to the wharf must have their yards braced sharp up by the port braces, their port anchor cocked-billed, or at the hawse ready to let go. Boats, bumpkins and davits to be rigged inboard.

"Third. Jib-booms must be rigged in the full length before landing, and no jib-booms shall be rigged out unless by permission from the harbor master, and then at their own risk.

"Fourth. Any person cutting or interfering with the moorings of any vessels will be punished according to law.

104 "Fifth. Any persons throwing ballast, rubbish or anything that will sink into the river, will be punished according to law.

"Sixth. The heating of pitch, tar or rosin is strictly prohibited on board any vessel lying at the wharf.

"Seventh. Vessels will not anchor at or near the wharves without permission of the harbor master.

"Eighth. No vessel shall change her berth without permission of the harbor master.

"Ninth. Masters of vessels failing to comply with the above rules will be held responsible for all damages in consequence besides laying themselves liable under the law.

"Tenth. And in the absence of the harbor master the superintendent in charge is authorized to enforce these regulations and to designate what accommoda*dation* which one vessel shall afford to another in conducting their business.

"That the secretary and treasurer have a sufficient number of both port regulations applying to the east and west banks and Westwego printed on large card-boards, and those applying to Westwego be sent to the superintendent with a letter designating how far he shall act in regard to section No. 10 of said port regulations.

"Having no other business on hand, the board adjourned.

"New Orleans, Jan'y 10th, 1894.

"(S'g'd) JOHN DAVIDSON,
"*Sec'y & Treas.*"

I remember going to Westwego with one of my colleagues and introducing him to the superintendent there; I do not remember the exact date. I believe the superintendent's name there was Roth at the time, but I am not sure. He was the gentleman connected with the elevator. He was considered the superintendent of the wharves there, was acting as manager of the wharves, I believe.

Q. And under section 10 of the resolutions adopted, or the rules adopted on the 10th of January, what appointment, if any, was made at Westwego?

105 A. Those resolutions were passed with the object of deputizing the superintendents of the wharves over at Westwego, and clothing him with authority there, by the harbor master, to move vessels in the event of the harbor master's not being there. I

don't know whether that is section 10 or not, but that was the object of the meeting. I do not remember the resolutions exactly, but it was simply to designate a superintendent of wharves over there, who should have charge of locating vessels at that wharf. I recognize the paper this morning, it was printed in accordance with those resolutions and paid for by the board of harbor masters. It was a copy of that which was taken by us to Westwego. One or more copies were printed expressly for Westwego under that resolution of the board of harbor masters.

Q. Now then, do you know who acted in 1894 in regard to collecting harbor dues under a State statute from vessels in New Orleans?

A. The harbor masters collected from 1882, or rather, from 1888 to 1894, to my positive knowledge, because I was a member of the board of harbor masters.

Q. What do you know about the collection of harbor dues of vessels going to Westwego?

A. The harbor masters collected all dues from vessels that went to Westwego during the year 1894—from 1888 to 1894.

Q. And you mean the whole of 1894 in your answer?

A. Yes, sir. There was no difference at all in the harbor dues at Westwego and other points in New Orleans.

Cross-examination by Mr. CLEVELAND:

Q. By what act was the board of harbor masters created?

A. The harbor masters—it's in the Statutes of Louisiana, page 698, article 3, section 1681. That was the creation of the board of harbor masters, of whom there were five appointed by the governor of the State of Louisiana.

106 Q. Who put the board of harbor masters in motion in relation to Westwego?

A. The board of harbor masters, proper, in the city of New Orleans. Who put them in motion in relation to Westwego, and why did we take this action, we took this action because we considered the law gave us authority to deputize any one over there, and I think, if you will look over the law, you will find the harbor masters have authority, by law, to deputize any one to fill their place. The book which I have produced contains all the minutes of all the meetings held by the harbor masters until the dissolution of the board, that is from the time I was there.

Q. I see there was a meeting held June 15, 1884, and one on November 27, 1888?

A. That was when I was first appointed; one on December 1st, 1888; one on February 6th, 1889; one in February, 1890, one November 7th, 1890; one on December 1st, 1890; one on December 7th, 1890; one on July 27th, 1892; one September 23, 1892; one on January 9, 1893; one on February 1st, 1893, and the next seems to have been on January 10, 1894. Nobody asked us to adopt those resolutions. On January 10, 1894. It was not brought to our attention by the Texas and Pacific Railway Company. We did it of

our own motion. We came to the conclusion that we had power to adopt rules and regulations concerning Westwego from the fact that we thought Westwego was in the port of New Orleans, or it was a question whether it was in the port of New Orleans, and we did it believing it to be a part of the port of New Orleans. We have since ascertained that it was not a part of the port at that time. We know there has been a law passed incorporating it since as a part of the port of New Orleans. At that time we believed it to be a part of the port of New Orleans, and believed it to be a portion of our collection district. We have since ascertained our mistake by the passing of the law incorporating it in the port of New Orleans.

107 Redirect examination.

By Mr. TAGGART:

Q. With reference to it now being within the port of New Orleans, in reference to the statutes of the United States?

A. Yes, sir; we always considered it a part of the port of New Orleans, and did at the time, and was surprised when we found it was not included in the custom-house business.

Defendant thereupon offered paper in evidence identified by witness Roth, and the same was marked "Exhibit Z 1026" and made a part hereof (printed p. 152 *post*).

The defendant thereupon called as a witness ALGERNON L. WILKINSON, who testified as follows:

I reside at Clarkson, Texas. I am connected with railroads and railroad business, and have been since 1872. Prior to November 12th, 1894, I was employed by the Texas and Pacific railroad at the Westwego wharves, New Orleans, of Jefferson parish, Louisiana. I had been so employed since January, 1894. I was clerk in charge of the wharves, or chief clerk of the wharves. The business transacted at those wharves was, generally speaking, receiving cotton and other freight to be delivered to steamships. Besides cotton, handled cotton-seed meal, cake, cotton-seed oil, some staves and some logs; but the bulk of it was meal, cake, cotton and oil. There was a season or time known there as the cotton season; that would cover from September, say, until March or April following. As to a general description of the wharf there, there were two platforms or sheds. The wharves were separate, No. 1 and No. 2 shed running parallel with the river and a width of about 140 feet, then a space between the sheds and the platform, where we unload the cars, of ten feet, and then from the shed to the river front about 50 or 60 feet. On the outside of the shed from the river there were two tracks, next to the river front one track on the wharf,
108 the other two below the wharves, so that the car doors would be level with the platform, about four feet six or eight inches lower. This wharf was used for freight for the different steamship lines.

Q. What different steamship lines received freight at this place?

Mr. CLEVELAND: Is that material?

Mr. TAGGART: I submit that it is, as showing that it was a recognized place of terminus for steamships, and showing the custom of doing business.

The COURT: The freight shipped by steamers by other people would not be material.

Mr. TAGGART: But showing that they recognized it as a regular place of connection with the railway; that it was a well recognized place between this railway company and steamship lines, I think I may show.

The COURT: You have already shown that either the whole or a great bulk of your cotton that came from the West by the Mississippi there was carried on your own rails and delivered to the steamer. That is in proof now.

Mr. TAGGART: I think Mr. Miller only testified as to the Elder-Dempster Company.

Mr. CLEVELAND: And the Harrison line also.

Mr. TAGGART: That is a fact, but it is not in proof up to this time. If it is a conceded fact, I shan't take any time for it—if it is understood that steamships generally went there other than the Elder-Dempster Company.

The COURT: Not the steamships generally, but the steamships to which you had freight to deliver. Any line to which you had freight to deliver west of the Mississippi went there to get it.

Q. What force generally did you have upon the wharf there? Just describe what force of employees there was.

109 A. That would depend upon the seasons. Taking the cotton season in October and November, say in 1894, we had in the office three clerks who attended to the records, &c., the office part of it. I had a clerk that kept the car numbers. I had a general force outside, and the check clerks would vary according to what we had to unload during the day. Some days eight, ten, or twelve, and some days three or four. The labor would run from 50 to possibly 200 a day. Those we would pick up in the same manner, with a few exceptions of regular ones. The first thing when a shipment came to Westwego the waybills would come with the car. They were brought in and checked by the yard clerk to see that they corresponded with the car. The waybills were brought in the office and skeletons made from those waybills, running with a progressive number, pro. numbers we call them; those pro. numbers were put on a clip or file and kept until called for, made and dated the day the car arrived there. The waybills then were worked up of the different cotton goods, giving the shipment point, car number, destination, consignee, marks, and were forwarded with a note for record to be kept of them in the New Orleans office. After the skeletons were thus prepared they were held subject to the cars being brought in to be discharged. For instance we wanted a certain lot of cotton in car 4200, we would get the skeleton of that car. it would be put on a platform, put in a shed ready to ship; the clerk who unloaded the cotton would mark on the skeleton the location of the port to which

the cotton went. The clerk would take this skeleton for the purpose of doing what I have described when the car was placed there for unloading. The waybill might arrive some time before the car would be sent up to the platform. The skeleton was dated the day the car would be received. In the meantime the cars would be kept on the storage tracks in the yard. There were numerous other tracks there. The skeletons were of the date the car came;
110 the date we received the car was the date of the skeleton. The first thing to be done was when the car is placed on the wharf for unloading, the clerk in charge of the car took the different car seals and put them on the skeleton; that is, the impression of them. After taking the seals they would be opened and a gangplank put in the car and the cotton put to its location in the shed. The location is left a good deal to the clerk, unless we have a particular reason to instruct where we want the discharge. He would then take out the contents of the car; say it called for fifty bales IXL cotton, if it was O K he would sign it, and put his name and put the location post, say No. 6. The shed was subdivided in fifteen locations to each shed. There were two sheds. Location No. 1 would be in the first section of No. 1 shed, run on through the shed in that way. I do not mean crosswise; I mean up and down the river. The posts were numbered. They were numbered with the shed up and down the river. He would then note the location on the skeleton, take it to the office and make his notations in ink, so that we would get an impression of them. The date of the unloading of the car was put on by the check clerk, also; the date he discharged the car was put on the skeleton; the skeleton showed everything. As to skeleton 1367, which you show me, that was made out on the 30th O K John S. ——; that car discharged on the 31st of October, and the location was post 22. Over here you will find the seals, as I have said—one side the seal 112; and there is one with the post—the location. In that way we would know the location of cotton having a particular mark, and also the date of unloading. Then, when that skeleton passed into the office, the clerk would take the skeleton and post the cotton record, showing that location on there, and those skeletons would be sent to the New Orleans office. We had a particular shed for cotton destined for a particular place. We tried to divide it off so that we could berth a vessel, and when she came there to get the cotton she could take it from the most convenient point, saving trucking a long way.
111 As to different points for different destinations, we had the east end No. 2 shed, or down-river end full of Bremen cotton—had been there quite a while; and we had Havre and Genoa toward the middle of the two sheds, and the bulk of Liverpool in No. 2 shed, some of it in 1. After unloading the cotton in this way it was left there for the ship to come and get it. When a ship came to get the cotton as a rule generally, the New Orleans office sent up a list of the cotton that the ship was to take; sent it up to our office. Then when the ship berthed the purser, or who ever was assigned to the cargo, would take the cargo from the wharf, would come in, we would locate the lots of cotton and go there with him and count

them as they stood in the sheds, he would O K it and then the longshoremen would break down the cotton, take the trucks to the river front and from that into the screw and put it into the ship. These longshoremen were in the employ of the stevedore who loaded the ship, and the screw men also. What I have described was the regular method of dealing with Elder, Dempster & Co. and the other steamship companies; that is, the regular routine of the work. It was during the time I was there.

By the COURT:

Q. When the ship's purser went there he went there with some of your clerks?

A. Yes, sir; just to count them.

Q. And when the ship's representative was there, not only the ship's representative was there, but your representative was there?

A. Yes, sir.

Cross-examination by Mr. CLEVELAND:

Our representative showed the ship's representative where the cotton was. He had no location, we had to show it.

Q. Was the wharf in the exclusive possession of the railroad company, as far as you know?

112 A. It was the general wharf for any ship that wanted to come and get cotton.

Q. But the railway company employees were the persons on the dock?

A. We employed the men on the dock. When anybody came there on the deck of the dock it was generally understood that they had permission of the railroad company. They have landed there without permission of the railway company, I suppose. I was the clerk in charge of the dock. I do not know whether I would have allowed a person to land unless I knew he had permission of the railway company or not. It all depends on circumstances. He might explain what he was there for. He would have to explain what he was there for in order to get on the dock, and that explanation would have to be satisfactory to me. We delivered other freight than what came over the Texas and Pacific rails to other ships. I am agent for the Texas Pacific Railroad at Clarksville, Red River county, Texas. I left Clarksville the 6th or 5th of this month, and I have attended here at the request and expense of the railway company. I have paid my own so far; I guess they will foot it. I went there last August. I am staying around at different places. I eat anywhere I land. I am down at Smith & McNell's; I have a room there. It is down on Fulton and Washington streets. I went there on Thursday last. I have been at Clarksville since August last. In July last I was at Paris, Texas, in the employment of the Texas and Pacific Railway Company, and was there since March, 1895. Then, from March, 1895, to August, 1896, I was in Paris in the employment of the railroad company as assistant agent there. I had charge of the company's property

there and attended to station work. It is a kind of dual position there. They have a commercial agent, and he was supposed to be away at the time, and I was to run it. From March, 1895, I quit the service of the Texas and Pacific Railway Company on the 27th of November, 1894, and I was idle until I went to work in the following March. I was in Chicago on the
113 West side, 297½ Oakley avenue, where I was keeping house with my family while I was idle. I was at no other place. I was not discharged by the Texas Pacific; I left of my own free will and accord, and have a copy of my letter of resignation, if you would like to see it. That was on the 27th of November that I resigned, and all the time from the 27th of November until March I was in Chicago. I think I was out of the city one or two days; I know I was in Indianapolis at that time. I went directly to Chicago from New Orleans, leaving New Orleans in December. In New Orleans I lived below the canal in Westwego, in what is called the white house there. I entered the employment of the defendant originally in January, 1894; prior to that time I had been at Savannah, Georgia. I did not go directly from Savannah to New Orleans. I was in Savannah in the fall, and went over to Union Springs, Georgia, and stayed a month or two, and went in the latter part of November or December, 1893. In Savannah I was in the employment of the Central Railroad and Banking Company of Georgia. I was not at their general office. I had charge of the terminals, of the wharves, and yards of Savannah as the agent. I went to Savannah from the Chesapeake and Ohio Railway Co., employed by Mr. C. C. G——, in New York, in October, 1890. I was general yardmaster of the Chesapeake and Ohio. I took charge of the yards in October, and in June following, in addition to the yards, I was given the terminal, which I had charge of, as I have stated, until 1893. I went to Richmond in 1880; was connected with the Richmond and Cairo and the Richmond and Allegheny until it was bought up by the Chesapeake and Ohio in 1889. In 1893 I left the employment of the Central Railroad and Banking Company of Georgia, in Savannah; that was September 30, 1893. When a ship arrived at Westwego, and the purser or the mate came on the dock, he would come to the office in regard to the delivery of the cotton to be shipped. I mean in my office, and the cotton was pointed
114 out to him. I or some of my employees went around to the different points and pointed out the cotton. I did not necessarily receive any paper from the ship or ship officers. They would come up and ask for the cotton. They would likely have the paper downtown, unless we got a message over the 'phone to give them any cotton they wanted. I got the mate's receipt for them before they left the wharf. I never knew of a bale of cotton leaving that wharf without a mate's receipt being given for it, except it was an oversight. I received messages over the 'phone to deliver cotton. The messages came from the New Orleans office, and also from the steamship agent, to give the ship what it could take, or not to give her certain lots; that she couldn't take it; her space was engaged else-

where. As a rule, my orders came from the New Orleans office. I worked under the New Orleans office.

By the THIRD JUROR:

Q. I want to know, after the cotton had been delivered off the cars on the dock, who paid the expenses of handling it up to and including the time it was given to the ship?

A. We paid the expenses of the cotton to put it on the dock, on to the wharves.

Q. From the time it was delivered on to the dock from the car, who paid the expenses up to and including its delivery to the ship?

A. What do you mean by delivery to the ship—taken aboard of the ship?

Q. Handing it to them?

A. The ship paid for taking it out of the shed. We were not even allowed to put in a man to help them without they paid 50 cents an hour. We only paid fifteen.

The defendant also introduced NATHAN DRAKE PEARSALL, who testified as follows:

I am division superintendent of the Louisiana division of
115 the Texas and Pacific Railway Company. My division includes the terminals at Westwego. I have been division superintendent not quite ten years. I was division superintendent when the Westwego wharves were built, which was in the fall of 1892. Since they were built they have been used for delivering the traffic of the Texas and Pacific Railway Company to steamships. They have been continuously so used since they were built. The Texas and Pacific has a wharf between Thalia and — street. It does not own additional wharves on the west side—the Westwego side—except at Westwego. The wharves in New Orleans are used for transferring freight to steamships; they are used for any business that the Texas and Pacific may have over the wharves, and, also, a part of the wharf is used for an inclined track to transfer cars across the road. The wharves at Thalia street are connected with the yard tracks in New Orleans. I know something in a general way of the delivery of cotton to steamships at Westwego. In a general way the wharves at Westwego are used by the Texas and Pacific railway to deliver traffic, cotton, cotton seed meal, staves, any class of traffic they may have, cattle or anything of that kind that is for delivery to steamships. I remember very distinctly the situation of the wharves at Westwego in the early part of November, 1894. During the cotton season I have frequently had conversations with Elder, Dempster & Co. or their agents, the Warriners, in New Orleans, respecting the removal of the cotton wharves—that is, prior to November 12th. I had conversations about once in ten days—as often as I saw any of their agents or representatives on the dock. The last distinct interview I remember with Elder, Dempster & Co.—with the Warriners, the agents of Elder, Dempster & Co.—prior to the fire was on Monday, and the fire occurred Monday night. I had that particular interview with Mr. Warriner, the

agent of the Elder-Dempster Company. I think both the brothers were present. The conversation took place in the office of Elder, Dempster & Co.

116 Q. Now will you state the substance of that conversation?

A. The substance of the conversation was, first, the amount of the cotton on hand at Westwego for Elder, Dempster & Company, which was stated, and the importance of moving the cotton was also stated by me, and they were requested to make every effort to move it at the earliest possible moment, and to comply with their contract. The exact words of their conversation I don't remember, but the sense of it was that their ships had met with great delays in New Orleans on account of the labor troubles that they had. At that time there was considerable trouble between the steamship agents and the cotton screw men; they were on a strike, the screw men, and they gave that as an excuse for not carrying out their contract of removing the cotton. That is about the sense of the conversation; I don't remember the exact words.

Q. What, if anything, was said by them as to expecting vessels or vessels being due.

A. They made the statement of when the vessels would be at Westwego, but I have forgotten what they said.

So far as I can recall prior to the 12th of November, I had a conversation with them—a week or ten days previous. I called at Elder, Dempster & Co.'s office in company with the general manager, Mr. L. S. Thorn, and had the same conversation.

By Mr. CLEVELAND:

Q. I thought you said Mr. Thorn was the superintendent of Elder, Dempster & Co.

A. No, sir; general manager of the railway company.

By Mr. TAGGART: The amount of cotton for Elder, Dempster &
Co. was stated, about the amount, and the time it should have
117 been removed, and the necessity of it being removed, and they gave about the same excuse that they had in the conversation previously mentioned. They may have mentioned the delays—some other delays—that I have forgotten; but that was the principal excuse.

Cross-examination by Mr. CLEVELAND:

Q. Do you happen to know that Elder, Dempster & Co. took away on the "Merrimac," on October 23d, 4,762 bales of cotton?

A. No, sir; I wouldn't know that unless I examined our records.

Q. Do you happen to know that they took away on the "Mound," on the same date, 5,506 bales of cotton?

A. No, sir.

Q. Do you happen to know that they took away on the "Montezuma," on November 24, 2,583 bales?

A. No, sir.

Q. Do you happen to know that they took away, on November 6th, on the "British Crown," 6,100 bales?

A. No, sir; nor that, on November 4th, they took away 4,000 on the "Hajeen." She arrived at Westwego October 31st. I presume a large amount of that was on the New Orleans side.

Q. Well, you know the "Hajeen" took cotton from Westwego?

A. No, sir.

Q. Haven't you heard that in the testimony of Mr. Miller today?

A. I did not hear Mr. Miller's testimony; I was in the court-room, but I did not hear it. I would not know except by the records that Elder, Dempster & Co. had these different ships at Westwego loading their cotton at the times you indicated. The first conversation I have narrated was about noon on the 12th of November. I went to their office. We spoke to Mr. Warriner. I think both brothers were present. Mr. Thorn opened the conversation
118 by stating the amount of the cotton. I am now stating the conversation I had in company with Mr. Thorn. I only went once with Mr. Thorn. November 12th I went in company with Mr Miller. We stated the amount of cotton on hand for them at Westwego, and requested to know when it could be moved. That was about the substance of the conversation. They gave various excuses.

Q. Don't tell me what they gave. Did they say excuse?

A. I do not know the words they used. They said in substance that their ships had been delayed; the principal cause of the delay was the labor troubles in New Orleans at that time. They also stated some of their ships had been delayed by bad weather, or something of that kind; that is all I recollect. I have been speaking about the conversation of November 12th—the one when Mr. Miller was present. The other conversation was in the same office. I went there with Mr. Thorn. I think it was about ten days before the fire, at about noon. All I remember being present, except the Warriners, was Mr. Thorn. I won't be sure both the Warriners were there; they had several clerks around. Mr. Thorn opened the conversation. He stated about the substance of the conversation. He stated about the amount of cotton on hand for Elder, Dempster & Co., that they had contracted to take and was to be moved by their steamship line, and asked when they could move it, and what the prospect was of the railroad company getting rid of it. The answer was that their ships had been delayed, and principally because of these labor troubles. I cannot recollect anything else that was said; that is the substance. I have now given you on my cross-examination the substance of both those conversations.

The defendant also introduces EDWARD L. SARGENT, who testifies as follows:

I am general freight agent of the Texas and Pacific rail-
119 way, and reside at Dallas, Texas. I have been general freight agent since September 1st, 1892. I am acquainted with the Messrs. Warriner, of New Orleans. I had a general understanding with them prior to November 12th, 1894, respecting the place where their steamers would receive cotton from the Texas and Pacific Railway Company.

By the COURT:

Q. The question is, whether you have had a conversation with Warriners?

A. Yes, sir. I had a conversation with Mr. Warriner, of the Elder-Dempster Company; the particular time was on the 27th of September, 1894, and the conversation related to the place of delivery of cotton.

Q. What was that conversation?

A. I called on Mr. Warriner, who represents Elder & Dempster at New Orleans, in reference to making a large contract for cotton to be delivered to him to be taken to Liverpool. We did not close on that day because he wanted to consult his principals, who, I believe, are located in Liverpool. We offered him a certain figure for the transportation of 20,000 bales of cotton to be received by him at Westwego and delivered at Liverpool. He was to cable that day, and I went back to my headquarters at Dallas. On the 29th of September I had a telegram from Mr. Miller, which stated that he had heard from his principal. Cotton was subsequently delivered to Westwego. Mr. Warriner said he would send his ships there for any amount over 500 bales.

This being all the testimony offered by the defendant in the above-entitled cause.

NATHAN DRAKE PEARSALL recalled by the plaintiff:

I said we built the dock in Westwego in the fall of 1893. I meant the Texas and Pacific; it was its own private dock.

Thereupon the plaintiff read the deposition of CALHOUN FLUKER:

120 I am special deputy collector of the port of New Orleans. I have been so for three and one-half years, and was during the months of October and November, 1894. I know the place called Westwego on the other side of the river.

Thereupon the plaintiff also read in evidence the depositon of M. WARRINER, who testified as follows:

Q. Mr. Warriner, what is your occupation?

A. Representing the Elder, Dempster Company, steamship agents. I have been representing the Elder, Dempster steamship line at New Orleans since 1892. In 1892 we were allotted a wharf at Jackson street. We have retained this wharf up to the present time. We have loaded vessels at other docks in the port of New Orleans. We have had no other leased or special dock. This is a grant from the city. It is not our dock. It is known in New Orleans as the Elder, Dempster Company's dock. During the season of 1893–'4, the season before the fire at Westwego, I think we received cotton from the Texas and Pacific Railway Co. I couldn't tell you, only very approximately, the number of bales we received from the Texas and Pacific Railway Co. during the season before the fire. But it would run into the thousands, I should think. We received a con-

siderable quantity during the season 1894 and 1895 from the Texas and Pacific Railway Co. That cotton was delivered to the Elder, Dem-ster Company's line at New Orleans in the season of 1893-'4 by dray, and during the season of 1894-'5 by drays and barges. During the season of 1894-'5 we also sent some of our steamships to Westwego to load.

Q. Will you please explain to me the custom that existed in the season of 1894-'5. That is, in October and November, 1894, in relation to the loading of cotton at Westwego?

A. We just sent our ships there to get whatever cotton was ready for delivery and signed for it.

Q. What was the first step in the process?

121 A. We would try and find out how much there was there first for us that they were ready to deliver. We received from time to time what they called transfer slips, which we took to be notification of the arrival of cotton and readiness for delivery.

Q. Look at the paper which I now show you, Mr. Warriner, being Plaintiff's Exhibit No. 65, a letter-press copy of a letter dated New Orleans, November 2d, and addressed by the Texas and Pacific Railway Co. to you. You recollect receiving letters of that character from the Texas and Pacific Railway Co.?

A. Constantly.

Q. Look at the paper which I now show you, which is marked "D'f't Ex. Z 1005;" that is your letter to the Texas and Pacific Railway Co. produced this morning by Mr. Miller, dated November 6th.

A. Ordering cotton to the Leyden.

Q. And you say in this letter, "Please have cotton as per inclosed transfers ready to deliver," etc.?

A. Yes, sir.

Q. Look at the paper which I now show you and which is marked "Def't Ex. Z 1006," and state if that is the class of transfers which you from time to time returned to the Texas and Pacific Railway Co.?

A. No; that is not the general form of transfer we returned. That is not the general form referred to here.

Q. What was that general form?

A. The general form is on a yellow slip—a long yellow paper.

Q. Such as the paper I now show you marked "Def't Ex. Z 128"?

A. Such as that.

Q. Now, you were about to say something concerning your custom in relation to these transfers?

A. The custom was to return these to the railroad with the order to deliver a specific steamship either at Westwego or about due at Westwego. I do not recollect ever seeing the particular paper which is shown me marked "Def't Ex. Z 1006." I remember a paper, something like that, in special instances where steamers were

122 due for large quantities of cotton, and special settlements were made in the communication between the two offices. Specia

communications were made from time to time to make the records clearer. Having received these transfer slips from the railway company, we returned them to the railway company as soon as we were ready to take delivery of the cotton. The custom that existed as to the actual delivery of the cotton to the ship was the same all over the port. The receiving officer of the ship counts the cotton and signs a receipt for it; the same with the Illinois Central depot; it is the same with the Southern Pacific, and it is the same with all the roads. The next step taken, after the officer of the ship has signed a receipt for it, he keeps its counterpart and sends that down to our office, and we sign the mate's receipt for the master. The master delivers the master's receipt to the railway company. The mate's receipts are sometimes taken away by the ship and sometimes they're not. Sometimes they take them away for their own purposes on the other side, in case there should be any dispute. The master's receipts are given in the form which you now show me; namely, "Def't's Ex. Z 1001." We did not make out and deliver to the railway company other form of receipt or bill of lading than the master's receipt.

Q. I show you a paper put in evidence this morning marked "Z 1007." Will you please read it and then state what this paragraph means: "Please hurry all master's receipts; we are still short of some for the steamship 'Imaum.' We are informed this morning about 450," etc.?

A. We get these forms filled in from the railroad with one plain copy of the through bill of lading. We get such forms such as "Z 1007" with a plain copy of the through bill of lading from the railroad company, and we mean by the words which are quoted to me that we are short of these documents, and could not sign them and could not make up our record. That the ship could not get up her freight list, and we couldn't settle with the ship. That is what is meant by the words you have quoted, "Please hurry
123 master's receipts. We are still short some for the S. S. 'Imaum.'"

Q. Then the railway company would send you what?

A. A receipt for cotton consigned on the through bill of lading and one plain copy of the through bill of lading, issued by them at the originating point. Then we would fill out these receipts or sign them in accordance with the mate's receipts, and then return two signed ones to the railway, keeping a plain copy and a copy of the through bill of lading to go forward with the ship to insure correct delivery at the port of discharge.

Q. A letter has been produced this morning, Mr. Warriner, dated October 18, 1894, from yourself to Mr. Wilkinson, marked "Ex. Z 1008." Will you be good enough to read it?

Witness reads as requested the letter referred to.

Q. Mr. Miller has testified, as I understand him, that there was a practice of loading cotton on your ships at Westwego for which he had received no regular transfers from your office. Do you know of such a practice?

A. The practice has been more general since the fire than before. It was not the practice before, according to my recollection. We are prepared to take any cotton at any time we have room for; receive it when it is delivered to the ship, and sign for it in the same way.

Thereupon Mr. Taggart read the letter of November 1st, 1894, produced by the witness and called for by plaintiff's counsel. The letter is as follows:

NOVEMBER 1ST, 1894.

C. G. Miller, Esq., T. & P. R'y:

S. S. "British Crown" left Westwego this morning after having taken 6,151 bales of cotton. We find, on comparing mate's receipts with cotton ordered that the deliveries to this ship have been of an unsatisfactory character. For instance, we discover that
124 some 500 to 600 bales were delivered to the ship although not ordered by us. We have not signed transfers for this cotton. On the other hand, we find that bills of lading for about 600 bales, the transfers of which we sent you while the ship was loading, have been split and the cotton confused in the most extraordinary manner, to our great inconvenience and possible loss. Of course, we know that occasional splits sometimes are unavoidable in the height of the season, but we cannot find any excuse for such confusion as the deliveries to the S. S. "British Crown" show to exist, and shall be glad if you will make a special effort to straighten this matter out as soon as possible. The splitting of bills of lading is a cause of great complaint of consignees on the other side, and injures us very considerably. We therefore suggest, before any other cotton is loaded, some better system of delivery be perfected by you. Following the S. S. "British Crown" we propose to load the S. S. "Leyden" and the steamer "Imaum" at Westwego, the former due on the 5th and the latter about the 9th, so that there will be plenty of time for Westwego to prepare, with a view to avoiding repetitions of such disorderly deliveries as were made to the S. S. "British Crown."

Yours truly,

(S'g'd) ELDER, DEMPSTER & CO.

Also following questions and answers:

Q. Looking at the letter of November 12, 1894, from your company to the Texas and Pacific Railway Company, do you recollect, Mr. Warriner, whether, in addition to the transfers mentioned in that letter, you had then any other transfers on hand which had been sent to you by the Texas and Pacific Railway Company?

A. No, sir; I think we had cleared every one out of the office and sent them back to the T. & P. railroad. We had a good many ships at about that time—two or three of them, certainly—and were anxious to get ready for them.

125 Q. Do you recollect, Mr. Warriner, that, on November 12th, 1894, the "S. S. Leyden" went up to Westwego?

A. It was about that time—the time of the fire.
Q. Had she begun loading?
A. No, sir.
Q. Do you know what was the reason?
A. I don't know exactly, now, what was the reason. She was very late—she should have been in four or five days before that. She made a very long passage.

The plaintiff also called WALTER B. SPENCER, who testified as follows:

I am a lawyer practicing in New Orleans, and one of the attorneys for the defendant in this action. I have been at Westwego once or twice. My firm is Howe, Spencer & Cocke. I represented the Texas and Pacific Railway Company in the matter of the application to have the limits of the port of New Orleans extended. I only know from hearsay.

PRATT A. BROWN was called on behalf of the plaintiff and testified as follows:

I am an attorney-at-law, practicing in New York city. One of the assistants of the plaintiff's counsel in this matter. I have calculated the interest on the amount that Mr. Webber gave as the value of this cotton from the 5th of August, 1895. I make it $1,286.65; making a total with the principal of $14,068.

Plaintiff rests.

Mr. CLEVELAND: I move for the direction of a verdict in favor of the plaintiff and against the defendant for the amount stated by Mr. Brown. Calling your honor's attention to the fact that, under the admissions of the answer, the defendant received the cotton under the bills of lading in evidence, and that they were in the possession of the defendant at the time of its destruction, the
126 defendant had the actual custody, and under the first clause that carrier alone shall be held liable therefor in whose actual custody the cotton shall be, the only pretense of delivery is a constructive delivery. It seems to me that that is not proved nor is there anything that could be held to be more than a semblance of proof of constructive delivery. But even the constructive delivery would not save the defendant, for, by express stipulation in the bill of lading, that carrier alone is liable in whose actual custody the cotton shall be at the time of such damage, detriment or loss. This being simply a question of delivery, it seems to me I have very little more to say.

Mr. TAGGART: I shall make a motion to direct a verdict for the defendant, and I have two grounds for my motion. My motion is based, first, on the ground that, under the authority of a decision of the Supreme Court of the United States, which I shall present to your honor covering this question, there was on the facts of this case an actual delivery to the steamship company. My second proposition is this: If your honor should be of the opinion that there is a differentiation if possible between this case and the Pratt case

(95 U. S.) under the facts, that then we come to another principle as to which the testimony is uncontradicted in this case, and that is that the Texas and Pacific Railway Company had carried this freight to its terminus, the point where it was to be delivered to the steamship company, and then had notified the steamship company that it was ready for delivery, and under the testimony produced had insisted upon the steamship company taking it away; and, under the principle of authorities of the Supreme Court of the United States and other Federal authorities, that, thereafter, it having discharged its duties and taken these steps, it was no longer responsible as a carrier, and would remain simply a warehouseman for the goods in its custody, and there being no proof whatever here of any negligence, so far as the defendant's custody was concerned, that the verdict must be for the defendant on this second ground.

127 *Direction of Verdict.*

The COURT: The motions made to direct a verdict in this case are eminently proper, because, so far as I can see, there is no conflict of evidence for the jury to pass upon. There is a dispute between the witness Warrener and some of the witnesses for the plaintiff; but it is not so much a dispute as to what the facts were as it is to what inferences the particular witnesses drew from the facts. It is a case, then, where the court should direct a verdict one way or the other.

The contract in suit provides that the defendant's part of the contract should be deemed to be fully performed upon delivery of the cotton to its next connecting carrier. This word "delivery" has given the courts a great deal of trouble. Possibly there is, perhaps, no one word about which more law has been laid down than about that word, delivery. Its meaning varies with the particular contract and with the peculiar circumstances attending the contract. But in this particular case, examining the bill of lading which embodies the terms of the contract between these parties, and giving to all the clauses which it contains their proper weight, and construing it as a whole, it seems impossible to escape the conviction that the word delivery is used in that contract with the meaning of a transfer of the *actual custody* of the goods from one carrier to another. It was quite appropriate that the transfer of actual custody should be made the test, because the perils to which goods may be exposed from flood or fire or pilfering or abstraction or what not—destruction of any kind—may vary, depending upon the particular custody in which such goods may be at the time. This contract, then, contemplates and expressly provides that the carrier who first receives the goods shall carry them forward to the end of its part of the route and there put them out of its actual custody into the actual custody of the next succeeding carrier. There is no provision, and I cannot
128 believe that it was in the contemplation of the parties, that by carrying to the end of the route and notifying the next carrier, without any notification to the shipper, the first carrier could change its relation to the shipper from that of carrier to that of

warehouseman. The very contingency of the failure or neglect or refusal of the second carrier to accept the goods from the first carrier is provided for, because it is left optional with the first carrier to send them forward by any other steamship line than the Elder-Dempster Steamship Company. I am clearly of the opinion, therefore, that under this particular contract, whatever the relations between the two carriers might be, whatever mutual rights or obligations might arise by reason of notices passing between them—as between the first carrier and the shipper the contract of carriage and the liability as a common carrier could be terminated only by the transfer of the actual custody from the first carrier to the second carrier, or by some notice brought home to the shipper of a modification of the contract.

The next question to be determined is whether there had been such transfer of actual custody in this particular case. The two authorities to which I have been particularly referred—Pratt *vs.* Railway Co. and the two Connecticut cases which are referred to therein—although they do not say so much about the ownership of the particular depot or wharf, do refer to such ownership as one of the elements of the decision, and I certainly cannot escape the conviction that it was an element of great importance in reaching the conclusion. In Pratt against the Railway Co., 95th U. S., the first carrier ran the goods upon tracks into the depot of the second carrier and put them down into part of the depot which the second carrier had set apart as the place where goods that the first carrier wished to forward should be placed and received by the second carrier, the whole depot being the property of and under the control of the second carrier. They were undoubtedly and unquestionably, when delivered in the depot of the
129 second carrier at that particular place, put within the actual custody of the second carrier. In commenting on Converse against The N. & N. Y. Transportation Company, 33 Conn., the supreme court referred to the circumstances that both companies had equal possession of the depot, equal control and jurisdiction over the depot. Now in this particular case that we have before us, the wharf is the wharf of the railroad company. Of course, in the supposititious case put by Mr. Taggart, where the goods are delivered by the first carrier upon the wharf of the second carrier, there undoubtedly *there* would be a transfer of actual custody. So in the second supposititious case, where some particular part of the wharf of the first carrier had been set apart and put within the control of the second carrier, so that the management, the charge, the control, the disposition of that particular part of the wharf and the property on it were entirely with the second carrier, then also there would be a change of the actual custody. But I do not understand that the testimony makes out such a case here. The dock was the dock of the Texas and Pacific Railway Company. They deposited the goods upon the dock, and sent the transfer slip, and all these various documents passed. What was the condition of the goods put upon the dock from that time on, so far as the steamship company was concerned? As I understand the testimony, the steamship company

had no business to come there to move those goods from one part of the dock to another, nor to change the way in which they were placed upon that dock. They could come there during business hours and ask to have their goods pointed out to them; could then, by their employees, during business hours, at a time when the railroad company was willing that they should come, move the goods from the particular location to the steamer, giving a receipt for them. But aside from that I do not understand that they had any control over the goods. They certainly had no control over the dock as a dock. They had nothing to do as to determining whereabouts on the dock these goods were to be placed. If they
130 were placed by post 29 when they arrived on Monday, they might be moved by the railroad company to post 43 on Tuesday, without the permission of the steamship company at all, without consulting the steamship company. *Per contra*, the steamship company could not move one bale on the dock from where it had been put to any other place on the dock. It could only move the goods from the dock to its ship, and then with the permission of the railroad company. Moreover, whatever windows or doors or skylights there might have been on the shed of the dock, whether they should be opened or closed was entirely within the control of the railroad company. How the cotton should be stacked upon the pier—whether in one, two, three or four tiers—whether it should be covered or not with tarpaulins—at what hours people should be allowed to come on the pier—who should be allowed to come—who should be kept off—what watchmen should be kept—what measures should be taken to protect the property from theft or contingencies of fire or flood—all those were wholly within the control of the Texas and Pacific Railroad Company, and as to any and all of them the steamship company had absolutely nothing to say whatever.

Under these circumstances I cannot escape the conviction that whatever may have been the relations established between these two companies by their course of dealing, by their contracts with each other, by the notices respectively given and the documents exchanged—of none of which the shipper had any information—so far as the shipper is concerned, the actual custody of those goods was not transferred from the first carrier to the second carrier until more was done to them than appears to have been done to these particular goods at the time of this fire.

Under those circumstances I feel constrained to direct a verdict in favor of the plaintiff for the full amount, denying the motion of the defendant on both grounds, with a separate exception on each ground and with an exception also to the direction in favor of the plaintiff. The amount of the verdict is $14,068.

Stay of sixty days after entry of judgment.

131 E. H. L., April 12, 1897. EXHIBIT B. L. 1. (See *ante*, p. 22.)

B. L. 35.

(Copy.)

Form 3038.

The Texas & Pacific Railway Company.

Export Cotton Bill of Lading.

Received by the Texas & Pacific Railway Company, in apparent good order and well conditioned, of Castner & Co. for delivery to shippers' order or their assigns, at Liverpool, Eng., he or they paying freight and charges as per margin, the following articles, viz: 200 bales of cotton, described as follows:

Number.	Marks.	
Two hundred.....	TCUP.....	118 B/c
	OXFO.....	51 "
	SABO.....	16 "
	JAXO.....	15 "
		200

Notify Newall & Clayton.

Bill of lading No. 35. T. & P. contract No. 44.
R. R. contract No. —. S. S. line contract No. —.

From Bonham, Texas, to Liverpool, Eng. Route: Via New Orleans & Elder & Dempster steamship line.

Gross weight at point of shipment, pounds 106,662. Through rate per 100 lbs., 111 cts., one hundred & eleven cts.

Exchange at $4.80 per pound sterling.

Total freight, $—. Advance charges, $—.

The terms and conditions hereof are understood and accepted by the owner.

132 Upon the following terms and conditions, which are fully assented to and accepted by the owner, viz:

1. That the liability of the Texas and Pacific Railway Company, in respect to said cotton, and under this contract, is limited to its own line of railway, and will cease, and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; and in case of any loss, detriment or damage done to or sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual cus-

tody the cotton shall be at the time of such damage, detriment or loss.

2. That the rate of freight for transportation of said cotton, specified in the margin hereof, is quoted and guaranteed with the distinct understanding and only on condition that the weight of said cotton is truly and correctly represented and stated; that said rate only includes the charge for transportation, and the specification of said rate shall not be taken as any guide for construction or evidence to extend this contract in other respects, or to bind the Texas & Pacific Railway Company to transport or to become in anywise responsible for said cotton after delivery thereof to its next connecting carrier, but shall only bind said company to protect said rate.

3. That the said cotton is subject, at the owner's cost, to the necessary repairs and baling; and the consignee- are to pay freight and charges on said cotton in lots or parts of lots as delivered.

4. That if said cotton or any part thereof shall be lost, damaged or destroyed by means or under circumstances rendering the Texas & Pacific Railway Company, or any connecting carrier, liable therefor, the damages recoverable therefor shall be computed at its value at the time and place of shipment, as evidenced hereby. It is expressly agreed and understood that the recitation in this bill of lading, that the cotton was received "in apparent good order and well conditioned," refers only to its external appearance, and if the said cotton is found damaged at the point of delivery, the burden of proof shall be upon the owner of said cotton, or the claimant for damages, to show, affirmatively, that the cotton was actually in good order and well conditioned when receipted for, it being understood that the carrier only obligates itself to deliver said cotton in like order and condition to the consignee, the unavoidable wear and tear and deterioration in due course of transportation only excepted as when received by it.

5. It is further agreed that in case said cotton is found at point of delivery to have been injured by any of the excepted clauses specified in this bill of lading, the burden of proof shall be upon the owner of said cotton, or claimant, to establish that such injury resulted from the fault of the carrier.

6. That the said cotton shall be transported from the port of New Orleans to the port of Liverpool Eng. by the Elder, Dempster & Co. steamship line, with liberty to ship by any other steamship
133 or steamship line; and upon delivery of said cotton to said ocean carrier at the aforesaid port this contract is accomplished, and thereupon and thereafter the said cotton shall be subject to all the terms and conditions expressed in the bills of lading and master's receipt in use by the steamship or steamship company or connecting lines by which said cotton may be transported; and upon delivery of said cotton, at usual place of delivery of the steamship or steamship lines carrying the same, at the port of destination the responsibility of the carriers shall cease.

In witness whereof the agent signing for the railway and steamship or steamship lines hath affirmed to three bills of lading of this

tenor and date, one of which being accomplished, the others to stand void.

Dated at Bonham, Texas, the 15th day of October, 1894.

J. M. BOOTH,
Agent, Severally, but not Jointly.

Endorsed:
Castner & Co.

R. T.
T .C., March 23, 1897.

134 E. H. L., Apr. 12, 1897. EXHIBIT B. L. 2. (See p. 22, *ante*).

(Copy.)

B. L. 61.

The Texas & Pacific Railway Company.

Export Cotton Bill of Lading.

Received by the Texas & Pacific Railway Company, in apparent good order and well conditioned, of Castner & Co. for delivery to shippers' order or their assigns, at Liverpool, Eng., he or they paying freight and charges as per margin, the following articles, viz: 100 bales of cotton, described as follows:

Number.	Marks.	
One hundred.....	OXFO.....	51 B/c
	JAXO.....	27 "
	QBEE.....	22 "
		100

Notify Newall & Clayton.

Delivery order granted for OXFO twenty-five bales cotton per "Mexico." Elder, Dempster & Co., 5/2/95, per H. P. Reynolds.

Bill of lading No. 61. T. & P. contract No. 44.
R. R. contract No. —. S. S. line contract No. —.

From Bonham, Texas, to Liverpool, Eng. Route: Via New Orleans & Elder, Dempster & Co. steamship line.

Gross weight at point of shipment, pounds 53,633. Through rate per 100 lbs., 111 cts., one hundred & eleven cts.

Exchange at $4.80 per pound sterling.

Total freight, $—. Advance charges, —.

The terms and conditions hereof are understood and accepted by the owner.

135 Upon the following terms and conditions, which are fully assented to and accepted by the owner, viz:

1. That the liability of the Texas and Pacific Railway Company, in respect to said cotton, and under this contract, is limited to its own line of railway, and will cease, and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; and in case of any loss, detriment or damage done to or

sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of such damage, detriment or loss.

2. That the rate of freight for transportation of said cotton, specified in the margin hereof, is quoted and guaranteed with the distinct understanding and only on condition that the weight of said cotton is truly and correctly represented and stated; that said rate only includes the charge for transportation, and the specification of such rate shall not be taken as any guide for construction or evidence to extend this contract in other respects, or to bind the Texas & Pacific Railway Company to transport or to become in anywise responsible for said cotton after delivery thereof to its next connecting carrier, but shall only bind said company to protect said rate.

3. That the said cotton is subject, at its owner's cost, to the necessary repairs and baling; and the consignee- are to pay freight and charges on said cotton in lots or parts of lots as delivered.

4. That if said cotton or any part thereof shall be lost, damaged or destroyed by means or under circumstances rendering the Texas & Pacific Railway Company, or any connecting carrier, liable therefor, the damages recoverable therefor shall be computed at its value at the time and place of shipment, as evidenced hereby. It is expressly agreed and understood that the recitation in this bill of lading, that the cotton was received "in apparent good order and well conditioned," refers only to its external appearance, and if the said cotton is found damaged at the point of delivery, the burden of proof shall be upon the owner of said cotton, or the claimant for damages, to show, affirmatively, that the cotton was actually in good order and well conditioned when receipted for, it being understood that the carrier only obligates itself to deliver said cotton in like order and condition to the consignee, the unavoidable wear and tear and deterioration in due course of transportation only excepted as when received by it.

5. It is further agreed that in case said cotton is found at point of delivery to have been injured by any of the excepted clauses specified in this bill of lading, the burden of proof shall be upon the owner of said cotton, or claimant, to establish that such injury resulted from the fault of the carrier.

6. That the said cotton shall be transported from the port of New Orleans to the port of Liverpool Eng. by the Elder, Dempster & Co. steamship line, with liberty to ship by any other steamship
136 or steamship line; and upon delivery of said cotton to said ocean carrier at the aforesaid port this contract is accomplished, and thereupon and thereafter the said cotton shall be subject to all the terms and conditions expressed in the bills of lading and master's receipt in use by the steamship or steamship company or connecting lines by which said cotton may be transported; and upon delivery of said cotton, at usual place of delivery of the steamship or steamship lines carrying the same, at the port of destination the responsibility of the carriers shall cease.

In witness whereof the agent signing for the railway and steamship or steamship lines hath affirmed to three bills of lading of this tenor and date, one of which being accomplished, the others to stand void.

Dated at Bonham Texas the 23rd day of Oct. 1894.

J. M. BOOTH,
Agent Severally, but not Jointly.
K & Co. No. 63918.

Endorsed:
Castner & Co. R. T.
Newall & Clayton. T. C. March 23, 1897.

137 E. H. L., April 12, 1897. EXHIBIT B. L. 3. (See p. 22, *ante*.)

B. L. 28.

(Copy.)

Form 3038.

The Texas & Pacific Railway Company.

Export Cotton Bill of Lading.

Received by the Texas & Pacific Railway Company, in apparent good order and well conditioned, of Castner & Co. for delivery to shippers' order or their assigns, at Liverpool, Eng., he or they paying freight and charges as per margin, the following articles, viz: — bales of cotton, described as follows:

Number.	Marks.	
One hundred.....	CARL.....	38 B/c
	OATS.....	54 "
	TCUP.....	8
		100

Notify Newall & Clayton.
M. B. of C. No. 1498 New York.
Delivery order granted for TCUP. eight bales cotton p. "Mexico" 5/2/95 Elder, Dempster & Co. per H. P. Reynolds.

Bill of lading No. 28. R. R. contract No. —.
T. & P. contract No. 44. S. S. contract No. —.

From Bonham, Texas, to Liverpool, Eng. Route: Via New Orleans & Elder, Dempster & Co. steamship line.

Gross weight at point of shipment, pounds 51,528. Through rate per 100 lbs., 111 cts., one hundred & eleven cts.

Exchange at $4.80 per pound sterling.

Total freight, $—. Advance charges, $—.

The terms and conditions hereof are understood and accepted by the owner.

138 Upon the following terms and conditions, which are fully assented to and accepted by the owner, viz:

1. That the liability of the Texas and Pacific Railway Company, in respect to said cotton, and under this contract, is limited to its own line of railway, and will cease, and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; and in case of any loss, detriment or damage done to or sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of such damage, detriment or loss.

2. That the rate of freight for transportation of said cotton, specified in the margin hereof, is quoted and guaranteed with the distinct understanding and only on condition that the weight of said cotton is truly and correctly represented and stated; that said rate only includes the charge for transportation, and the specification of said rate shall not be taken as any guide for construction or evidence to extend this contract in other respects, or to bind the Texas & Pacific Railway Company to transport or to become in anywise responsible for said cotton after delivery thereof to its next connecting carrier, but shall only bind said company to protect said rate.

3. That the said cotton is subject, at its owner's cost, to the necessary repairs and bailing; and the consignee, are to pay freight and charges on said cotton in lots or parts of lots as delivered.

4. That if said cotton or any part thereof shall be lost, damaged or destroyed by means or under circumstances rendering the Texas & Pacific Railway Company, or any connecting carrier, liable therefor, the damages recoverable therefor shall be computed at its value at the time and place of shipment, as evidenced hereby. It is expressly agreed and understood that the recitation in this bill of lading, that the cotton was received "in apparent good order and well conditioned," refers only to its external appearance, and if the said cotton is found damaged at the point of delivery, the burden of proof shall be upon the owner of said cotton, or the claimant for damages, to show, affirmatively, that the cotton was actually in good order and well conditioned when receipted for, it being understood that the carrier only obligates itself to deliver said cotton in like order and condition to the consignee, the unavoidable wear and tear and deterioration in due course of transportation only excepted as when received by it.

5. It is further agreed that in case said cotton is found at point of delivery to have been injured by any of the excepted clauses specified in this bill of lading, the burden of proof shall be upon the owner of said cotton, or claimant to establish that such injury resulted from the fault of the carrier.

6. That the said cotton shall be transported from the port of New Orleans to the port of Liverpool, Eng., by the Elder, Dempster & Co. steamship line, with liberty to ship by any other steamship or steamship line; and upon delivery of said cotton to said ocean carrier at the aforesaid port this contract is accomplished, and thereupon and thereafter the said cotton shall be subject to all the terms and conditions expressed in the bills of lading and

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master's receipt in use by the steamship or steamship company or connecting lines by which said cotton may be transported; and upon delivery of said cotton, at usual place of delivery of the steamship or steamship lines carrying the same, at the port of destination the responsibility of the carriers shall cease.

In witness whereof the agent signing for the railway and steamship or steamship lines hath affirmed to three bills of lading of this tenor and date, one of which being accomplished, the others to stand void.

Dated at Bonham, Texas, the 10th day of Oct., 1894.

J. M. BOOTH,
Agent Severally, but not Jointly.

Endorsed:
Castner & Co.
Newell & Clayton.
R. T.
T. C., March 23, 1897.

140 E. H. L., Apr. 12, 1897. EXHIBIT B. L. 4. (See p. 22, *ante.*)

B. L. 29.

(Copy.)

Form 3038.

The Texas & Pacific Railway Company.

Export Cotton Bill of Lading.

Received by the Texas & Pacific Railway Company, in apparent good order and well conditioned, of Castner & Co. for delivery to shippers' order or their assigns, at Liverpool, Eng., he or they paying freight and charges as per margin, the following articles, viz: 100 bales of cotton, described as follows:

Number.	Marks.		
One hundred.....	JPAN.....	66	B/c
	TCUP.....	12	"
	SABO.....	22	
		100	

Notify Newell & Calyton.
M. B. of C. No. 1497 New York.

Bill of lading No. 29.
R. R. contract No. —.
T. & P. contract No. 44.
S. S. line contract No. —.

From Bonham, Texas, to Liverpool, Eng. Route: Via New Orleans & Elder, Dempster & Co. steamship line.

Gross weight at point of shipment, pounds 53,304. Through rate per 100 lbs., 111 cts., one hundred & eleven cts.

Exchange at $4.80 per pound sterling.

Total freight, $—. Advance charges, $—.

The terms and conditions hereof are understood and accepted by the owner.

Upon the following terms and conditions, which are fully assented to and accepted by the owner, viz:

141 1. That the liability of the Texas and Pacific Railway Company, in respect to said cotton, and under this contract, is limited to its own line of railway, and will cease, and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; and in case of any loss, detriment or damage done to or sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of such damage, detriment or loss.

2. That the rate of freight for transportation of said cotton, specified in the margin hereof, is quoted and guaranteed with the distinct understanding and only on condition that the weight of said cotton is truly and correctly represented and stated; that said rate only includes the charge for transportation, and the specification of said rate shall not be taken as any guide for construction or evidence to extend this contract in other respects, or to bind the Texas & Pacific Railway Company to transport or to become in anywise responsible for said cotton after delivery thereof to its next connecting carrier, but shall only bind said company to protect said rate.

3. That the said cotton is subject, at its owner's cost, to the necessary repairs and baling; and the consignee are to pay freight and charges on said cotton in lots or parts of lots as delivered.

4. That if said cotton or any part thereof shall be lost, damaged or destroyed by means or under circumstances rendering the Texas & Pacific Railway Company, or any connecting carrier, liable therefor, the damages recoverable therefor shall be computed at its value at the time and place of shipment, as evidenced hereby. It is expressly agreed and understood that the recitation in this bill of lading, that the cotton was received "in apparent good order and well conditioned," refers only to its external appearance, and if the said cotton is found damaged at the point of delivery, the burden of proof shall be upon the owner of said cotton, or the claimant for damages, to show, affirmatively, that the cotton was actually in good order and well conditioned when receipted for, it being understood that the carrier only obligates itself to deliver said cotton in like order and condition to the consignee, the unavoidable wear and tear and deterioration in due course of transportation only excepted as when received by it.

5. It is further agreed that in case said cotton is found at point of delivery to have been injured by any of the excepted clauses specified in this bill of lading, the burden of proof shall be upon the owner of said cotton, or claimant, to establish that such injury resulted from the fault of the carrier.

6. That the said cotton shall be transported from the port of New Orleans to the port of Liverpool, Eng., by the Elder, Dempster & Co. steamship line, with liberty to ship by any other steamship

142 or steamship line; and upon delivery of said cotton to said ocean carrier at the aforesaid port this contract is accomplished,

and thereupon and thereafter the said cotton shall be subject to all the terms and conditions expressed in the bills of lading and master's receipt in use by the steamship or steamship company or connecting lines by which said cotton may be transported; and upon delivery of said cotton, at usual place of delivery of the steamship or steamship lines carrying the same, at the port of destination the responsibility of the carriers shall cease.

In witness whereof the agent signing for the railway and steamship or steamship lines hath affirmed to three bills of lading of this tenor and date, one of which being accomplished, the others to stand void.

Dated at Bonham, Texas, the 10th day of Oct., 1894.

J. M. BOOTH,
Agent Severally, but not Jointly.

Endorsed:
Castner & Co.

R. T.
T. C. March 23, 1897.

143 E. H. L., Apr. 12, 1897. EXHIBIT C. (See p. 22, *ante*.)

United States Circuit Court, Southern District of New York.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES Anderson Earle
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

DE FOUBLANQUE PENNEFATHER
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

ARTHUR BOWER FORWOOD, ERNEST HARRISON FORWOOD, and HAROLD STANLEY FORWOOD
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

PHILIPP CORNELIUS HEINEKEN and JOHANNES VOGELSANG
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

& thirty-nine other cases.

It is hereby stipulated between the parties hereto,

144 First. That the bills of lading which are marked R. T. and T. C., March 23rd, 1897, were, on the day of their respective dates, duly issued and delivered by the defendant to the shippers therein named, at the place therein stated as the place of dates.

Second. For the purposes of arriving at the value at the place of shipment, at the date of the bill of lading, of any of the cotton included in any of the forty-three (43) actions pending in this court against the Texas and Pacific Railway Company, arising out of the fire at Westwego on November 12, 1894.

The weight given on each of the bills of lading as the aggregate

weight of all the bales of cotton therein stated to have been shipped, shall be divided by the number of bales of cotton therein stated to have been shipped, and the result shall be taken as the weight per bale. In case of a total loss of the cotton described in the original invoices, in possession of the plaintiffs' attorneys, the grades shall be taken to be as described in said invoices, and the value of said grades of cotton shall be determined as hereinafter set forth.

In case a portion only of the cotton in any invoice shall have been destroyed, and it is not possible to definitely identify the particular bales of cotton destroyed, then the cotton destroyed shall be considered to be the lowest grade shown on the invoice on which such destroyed cotton appears.

The prices, per pound, of such grades shall be the New Orleans price current at the date of the bill of lading for such grades of cotton, less the amount of rail freight from shipping point to New Orleans, fixed and agreed for this purpose at seventy-five (75) cents per hundred pounds,—such New Orleans price current to be fixed by the secretary of the cotton exchange at New Orleans, or by the secretary of the cotton exchange at New York.

Third. The plaintiffs' attorneys shall furnish to defendant's attorneys copies of the invoices covering the four cases now on the calendar, on or before the 31st of March, and copies of invoices
145 covering the remainder of the suits within a seasonable time thereafter, and at least four weeks before any of said cases shall be moved for trial.

Fourth. The trial of these cases shall be set for the second Monday of April, 1897, provided that the adjournment of the trial of the cases beyond the day when they are first called for trial shall not interfere with their trial on such second Monday of April, 1897.

Dated New Orleans, March 23rd, 1897.

EVARTS, CHOATE & BEAMAN,
Plaintiffs' Attorneys.
RUSH TAGGART, *Defendant's Attorney.*

E. H. L., April 12, 1897. EXHIBIT D 1. (See p. 22, *ante*.)

Order dated Oct. 10th, 300 B/C; Oct. 11th, 100 B/C.

Invoice of 400 bales of cotton shipped today by Castner & Co. from Bonham, Tex., to Liverpool via New Orleans and consigned to order for account and risk of consignment to Messrs. Newall & Clayton.

Basis—300 at $3\frac{5}{32}$, 100 at $3\frac{3}{32}-\frac{1}{16}$d. added for $1\frac{1}{16}$ at $1\frac{1}{8}$ staple; $1\frac{1}{2}$d. added for $1\frac{1}{8}$ at $\frac{3}{16}$ staple.

JPAN	6	B/C	Fy G Mid	$1\frac{1}{8}-\frac{3}{16}$	3228	at	$3\frac{1}{32}$	11197d.
TCUP	187	"	G Mid	"	98617		$3\frac{3}{32}$	335914
GFOX	107	"	Fy Mid	"	55840		$3\frac{1}{32}$	186715
QBEE	22	"	Mid	"	11614		$3\frac{7}{32}$	84074
JAXO	27	"	Fy Mid	$1\frac{1}{16}-1\frac{1}{8}$	14506			
OXFO	51	"	G Mid	"	27513		$3\frac{9}{32}$	90277
	400				211318			708177d.
			Less 6%					42490
								665687d. £2773 13 11

Less freight.....	157685 at 112 56d...	367 18 8		
"	53633 111 55½ ..	124 0 6		
			491 19 2	
Commissions at ½%			11 8 2	
Bank com'n at ¼%			5 13 6	
				509 0 10
Amount our draft at 60 D/S upon Messrs. Dennistown, Cross & Co.				£2264 13 1

Insured in Thames & Mersey for $12,000.00.

E. & O. E.	PCUP	5	Euskaro	Dec. 3
Bonham Tex. Oct. 24th 1894.	GFOX	10	do.	3
	GFOX	25	Bellarder	" 23
	PCUP	160	do.	23

CASTNER & CO.

146 E. H. L., Apr. 12, 1897. EXHIBIT D 2. (See p. 22, *ante*.)

Order dated Oct. 1st.

Invoice of 100 bales of cotton shipped today by Castner & Co. from Bonham, Texas, to Liverpool, Eng., via New Orleans and consigned to order for account and risk of consignment to Newall & Clayton.

Basis mid good Cp 3 5/16 ⅛ to 1/16 added for staple.
⅛d. difference on full grades.

JPAN	66 B/C Fy G M 1⅛ to ⅛	34796	at 3 9/16 ..	123961	
TCUP	12 " G M " "	6561	} at 3½ ..	64778	
SABO	22 " Fy " 1 1/16 " 1⅛	11947			
		53304		188739	
Less 6%				11324	
				177415	£739 4 7
Less freight at 111 = 55½d. on 53304.....				£123 5 4	
Commis. at ½%				3 1 7	
Bk. " " ¼ "				1 10 7	
					127 17 6
Amount our d'ft at 60 d/s upon Mess. Dennistown, Cross & Co.					£611 7 1

E. & O. E.
Bonham Texas Oct. 10, 1894.
Insured in Thames & Mersey for $3,300.00.

CASTNER & CO.,
By W.

147 E. H. L., April 12, 1897. EXHIBIT D 3. (See *ante*, p. 22.)

Order dated Oct. 4.

Invoice of 100 bales of cotton shipped today by Castner & Co. from Bonham, Texas, to Liverpool, Eng., via New Orleans and consigned to order for account and risk of consignment to Newall & Clayton.

Basis mid good Cp 3⅛ to 5/16d. added for staple.
⅛d. diff. on full grades.

Selected cottons.

CARL	38 Fy G M 1 3/16 to ¼	19561	at 3 9/16 ..	69686d.	
OATS	54 " " " 9/16	27750	" 3½ ..	97125	
TCUP	8 " 1⅛ " 5/16	4217	at 3 7/16 ..	14496	
		51528		181307	
Less 6%				10878	
				170429	£710 2 5

Less freight at 111 = 55½d. on 51528	£119 3 2	
Commis. at ½%	2 19 1	
Bk. " " ¼ "	1 9 5	
		123 11 8
Amount our d'ft at 60 d/s upon Mess. Dennistown, Cross & Co.		£586 10 9

E. & O. E.
Bonham Texas Oct. 10, 1894.
Insured in Thames & Mersey for $3,100.00.

CASTNER & CO.,
By W.

148 E. H. L., Apr. 12, 1897. EXHIBIT D 4. (See p. 22, *ante*.)

Order dated Oct. 12.

Invoice of 200 bales of cotton shipped today by Castner & Co. from Bonham, Texas, to Liverpool, Eng., via New Orleans and consigned to order for account and risk of consignment to Newall & Clayton.

Basis mid good Cp $3\frac{5}{32}$ $\frac{1}{16}$ to $\frac{3}{32}$ added for staple.
$\frac{1}{8}$d. difference on full grades.

TCUP	118	B/C	good mid	$1\frac{1}{8}$	to $\frac{3}{16}$	62438	at $3\frac{3}{8}$ =	210728d.
SABO	16	"	Fy "	$1\frac{1}{16}$	" $\frac{1}{8}$	8410	" $3\frac{13}{32}$ =	28646
OXFO	51	"	good "	"	" "	27633	" $3\frac{11}{32}$ =	92397
JAXO	15	"	Fy mid "	"	" "	8181	" $3\frac{9}{32}$ =	26844
	200					106662		358615
			Less 6%					21516
								337099 £1404 11 7

Less freight at 111 = 55½d.	£246 13 1	
Commis. " ½%	5 15 9	
Bk. " " ¼ "	2 17 7	
		255 6 5
Amount our d'ft upon Mess. Dennistown, C. & Co. at 60 d/s		£1149 5 2

Insured in Thames & Mersey for $6,200.
E. & O. E.
Bonham Texas Oct. 15th 1894.

CASTNER & CO.,
By W.

Exhibit E, schedule of prices (not printed). (See stipulation, p. 155.)

Form 1126.†

The Texas & Pacific Railway Co. W. B. No. 558.

Cotton Waybill. Car No. —.

From Bonham to New Orleans, La., Oct. 25, 1894, via Tc. Jct. & Marshall. Whose car, T. & P., B 1.

When the rates charged for transportation are less than tariff, the number of special authorizing such rate must be stated in the waybill.

Consignor.	Consignee and destination.	Bill of lading.			Number bales forwarded on this W. B.	Marks and tag Nos.	Weight.	Rates. Lot	Freight.	Charges.	Prepaid.	Total to pay.
		No. bales signed for.	Date of B. L.	Number of B. L.								
	Shippers' order							6073				
Castner & Co.	Notify Newall & Clayton	100	10/10	28	25	C P OATS 5089/5113	125.00 Comp. S. S.	51 79 10 49 21	64 73			64 73
	Liverpool Eng.	11,997	Actual	Gross invoice W. P.								
Via Elder	Dempster & Co.	S. S. line			Contract	No. 44.					13 70	
Transferred at Lamar Compress from car ..... to " ..... Oct. 26	6348 P & P 1894	1,797				Compress at Honey Grove.						

JOHN HENRY CLAYTON ET AL.

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150 E. H. L., Apr. 18, 1897. EXHIBIT D'F'T Z 27, W. B. (See p. 86, *ante.*)

Form 3012½.

No. Post, 22. *Receipt for Cotton Delivered.* No. 1367.

Received from the Texas and Pacific Railway Co., in good order, New Orleans, 10/30, 1894.

Date of W. B.	No. of W. B.	No. of car.	Where from.	Shipper.	Consignee.	No. of bales.	Marks and tag numbers.	Weight.	Rate.	Charges.	Freight.	Remarks.
10/24	535	T. & P. 3206	Bonham. B/L Co. 100 B/C Seal 112 J. M. 894	Castner & Co. o/n	Newall & Clayton Liverpool Via	2 2 O K E. D.	O. X. F. O. J. A. X. O. John Sanborn 10–31–'94 Post 22 line					1802 O K

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D'F'T Z 54, W. B. (See *ante*, p. 86.)

Form 1108. E D and Co.

The Texas and Pacific Railway Co. Sheet No. 1789.

Memorandum of freight transferred and delivered to the —— railway at Westwego station this 1st day of Nov., 1894, in good order and condition (unless otherwise noted), to be forwarded as indicated hereunder.

Waybill. Date.	Waybill. No.	Car No. and initial.	Expense bill No.	Where from and shipper.	Consignee and destination.	Articles.	Weight.	Rates. Through.	Rates. Local.	Freight.	Charges.	Total to pay.	Prepaid.
10/25	559	2972 T. & P.	12014 46^{64}	Bonham, Castner & Co.	Shipper's order Notify Newell and Clayton Liverpool, Eng.	18 B/c....	9,000	51 79	.....	46 64			
						OATS..	.....	10	.....	.....	9 00		
10/26	543	"	12012 9^{00} 1378	Honey Grove.	B	B/L 28... 100 Cont. 44—	.....	49 21	.....	.....	.....	55 64	

I hereby certify transfer to have been made, as per memorandum above.

—— ——, *Agent.*

JOHN HENRY CLAYTON ET AL.

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152 E. H. L., Apr. 13, 1897. EXHIBIT DEF'T EX. Z 1026, W. B.
(See p. 107, *ante*.)

Board of harbor masters, port of New Orleans, 187 Gravier street, room No. 5.

Ed. L. Cope, lower city limit to Canal St.
E. D. Dean, Canal to Henderson Sts.
Geo. Buchert, Henderson to Jackson Sts.
John J. Fitzgerald, Jackson St. to Southport.

Ed. L. Cope, president. John Davidson, sec'y and treasurer.

Port Regulations Applying to Westwego Wharves, Westwego, La.

Port of New Orleans.

First. The harbor master has authority by law to regulate, moor and station all vessels at the wharf and to remove them from time to time to make room for others and the degree of accommodation which one vessel shall afford to another, the harbor master is constituted sole judge.

Second. Vessels coming to the wharf must have their yards braced sharp up by the port braces, their port anchor on the forecastle and their starboard anchor cock*ed* billed, or at the hawse ready to let go. Boats, bumpkins and davits to be rigged inboard.

Third. Jib-booms must be rigged in the full length before
153 landing, and no jib-booms shall be rigged out unless by permission from the harbor master and then at their own risk.

Fourth. Any person cutting or interfering with the moorings of any vessels will be punished according to law.

Fifth. Any person throwing ballast, rubbish or anything that will sink into the river will be punished according to law.

Sixth. The heating of pitch, tar or rosin is strictly prohibited on board any vessel lying at the wharf.

Seventh. Vessels will not anchor at or near the wharves without permission of the harbor master.

Eighth. No vessel shall change her berth without permission of the harbor master.

Ninth. Masters of vessels failing to comply with the above rules will be held responsible for all damages in consequence, besides laying themselves liable under the law.

Tenth. And in the absence of the harbor master the superintendent in charge is authorized to enforce these regulations, and to designate what accommodation which one vessel shall afford to another in conducting their business.

By order of the—

BOARD OF HARBOR MASTERS.
ED. L. COPE, *President.*

Adopted Jan. 10th, '94.

154 SCHEDULE A REFERRED TO IN STIPULATION, P. 155.

Abstract Showing Car Nos., Date of Arrival at Westwego, and Dates of Unloading.

1894.	W. B.	Bill of lading No.	Articles.	Car No.	Arrived Westwego.	Unloaded Westwego.
10/25	558	28	25 B/C O. A. T. S.....	T. & P. 6348	10-29-'94	10-31-'94
"	560	"	3 " "	T. & P. 322	10-29-'94	10-31-'94
"	592	"	7 " "	T. & P. 3206	10-29-'94	10-31-'94
"	593	"	1 " "	T. & P. 3206	10-29-'94	10-31-'94
"	589	"	25 " C. A. S. L	T. & P. 6235	11- 3-'94	11- 4-'94
"	590	"	13 " "	T. & P. 3222	10-29-'94	10-31-'94
"	557	29	22 " S. A. B. O.....	T. & P. 622	10-29-'94	10-31-'94
"	556	"	24 " J. P. A. N.....	T. & P. 622	10-29-'94	10-31-'94
"	586	"	24 " " ...	T. & P. 6348	10-29-'94	10-31-'94
"	587	"	18 " "	T. & P. 3206	10-24-'94	10-31-'94
"	588	"	12 " T. C. U. P....	T. & P. 3222	10-29-'94	10-31-'94
"	559	28 #	18 " O. A. T. S....	T. & P. 2772	10-29-'94	10-31-'94
10/16	232	35	16 " S. A. B. O.....	T. & P. 6506	10-24-'94	10-24-'94
"	235	"	3 " T. C. U. P.....	T. & P. 6506	10-24-'94	10-24-'94
10/15	212	"	25 " "	T. & P. 6564	10-21-'94	10-22-'94
"	213	"	25 " "	T. & P. 6564	10-21-'94	10-22-'94
"	210	"	24 " "	T. & P. 16	10-21-'94	10-22-'94
"	211	"	25 " "	T. & P. 16	10-21-'94	10-22-'94
10/16	236	"	16 " "	T. & P. 6293	10-23-'94	10-25-'94
"	231	"	25 " O. X. F. O.....	T. & P. 6120	10-23-'94	10-24-'94
"	230	"	25 " " ...	T. & P. 6120	10-23-'94	10-24-'94
"	234	"	1 " "	T. & P. 6506	10-24-'94	10-24-'94
"	233	"	15 " J. A. X. O.....	T. & P. 6506	10-24-'94	10-24-'94
10/23	462	61	24 " O. X. F. O ...	T. & P. 3746	10-29-'94	10-30-'94
"	463	"	25 " J. A. X. O.....	T. & P. 6360	11- 2-'94	11- 4-'94
10/24	502	"	22 " Q. B. E. E ..	T. & P. 6063	10-29-'94	11- 1-'94
"	535	"	2 " O. X. F. O.....	T. & P. 3206	10-29-'94	10-31-'94
"	"	"	2 " J. A. X. O....	T. & P. 3206	10-29-'94	10-31-'94

The foregoing contains all the evidence offered or given on the trial of the cause and upon the application of the defendant this bill of exceptions is allowed by me and ordered to become part of the record in this cause at the term aforesaid, and he filed *nunc pro tunc* as of the 14th day of April, 1897, on this — day of ——, 1897.

——— ———,

United States Circuit Judge.

155 It is hereby stipulated and agreed that the foregoing bill of exceptions contains all the evidence offered or given upon the trial of this cause, and that the same may be signed by the judge, and be filed *nunc pro tunc* as of April 14th, 1897.

It is also stipulated that "Exhibit E," schedule of prices, and that the waybills, skeleton sheets, transfer sheets and master's receipts referred to in the bill of exceptions and offered in evidence, and also entries in the books of the arrival of cars other than the

abstract presented herewith and marked "Schedule A," need not be printed, but the originals may be read or referred to upon the argument of the cause by either party if desired.

July 27, 1897.

EVARTS, CHOATE & BEAMAN,
Attorneys for Plaintiffs.
RUSH TAGGART, *Attorney for Defendant.*

(Endorsed:) U. S circuit ct., so. dist. of N. Y. John Henry Clayton *et al. vs.* The Texas and Pacific Railway Company. Bill of exceptions. Rush Taggart, defendant's attorney, 195 Broadway, New York city. U. S. circuit court. Filed Aug. 5, 1897, *nunc pro tunc* as of 14 April, 1897. John A. Shields, clerk.

156 United States Circuit Court, Southern District of New York.

JOHN HENRY CLAYTON, Plaintiff,
vs.
TEXAS AND PACIFIC RAILWAY COMPANY, Defendant.

It is hereby stipulated and agreed that the exhibits as printed in the bill of exceptions in the above-entitled action may constitute the record of said exhibits in said action.

Dated New York, July 29th, 1897.

EVARTS, CHOATE & BEAMAN,
Plaintiff's Attorneys.
RUSH TAGGART, *Defendant's Attorney.*

(Endorsed:) Circuit court of the United States for the southern district of New York. John Henry Clayton, plaintiff, *vs.* Texas & Pacific Railway Company, defendant. Stipulation as to exhibits. U. S. circuit court. Filed Aug. 5, 1897. John A. Shields, clerk.

157 Circuit Court of the United States for the Southern District of New York.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANDERSON EARLE
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Assignment of Errors.

Afterwards, to wit, at the same term at which the above-entitled suit was tried and judgment therein rendered, comes said defendant, by Rush Taggart, its attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

First. The court erred in denying the motion of the defendant to direct a verdict in favor of the defendant when the plaintiffs rested their case.

Second. That the court erred in directing a verdict for the plaintiffs.

Third. That the court erred in refusing to direct a verdict for the defendant at the conclusion of the testimony, upon the ground that the testimony showed that there had been a delivery of the cotton sued for to the connecting carrier, the Elder, Dempster & Company line of steamers.

Fourth. That the court erred in refusing to direct a verdict for the defendant at the conclusion of the testimony, upon the
158 ground that the defendant's relation to the plaintiffs was that of warehouseman and not that of common carrier.

Wherefore, the defendant prays that the judgment entered herein may be set aside and reversed and that a judgment in favor of this defendant herein be entered as prayed in its answer.

RUSH TAGGART,
Attorney for Defendant, No. 195 *Broadway, New York City.*

(Endorsed:) U. S. circuit court. Texas and Pacific Railway Co. *et al.*, plaintiffs in error, against John Henry Clayton *et al.*, defendants in error. Assignment of errors. Rush Taggart, attorney for pl'ff in error, 195 Broadway, New York. John F. Dillon, counsel. U. S. circuit court. Filed Jul- 22, 1897. John A. Shields, clerk.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANDERSON EARLE *vs.* THE TEXAS AND PACIFIC RAILWAY COMPANY. } Bond for Damages and Costs.

Know all men by these presents that we, the Texas and
159 Pacific Railway Company, as principal, and the National Surety Company, having an office and principal place of business at No. 346 Broadway, in the city of New York, county and State of New York, as surety, are held and firmly bound unto the above-named John Henry Clayton, Nicholas Roberts and Charles Anderson Earle in the sum of thirty thousand ($30,000) dollars, to be paid to the said John Henry Clayton, Nicholas Roberts and Charles Anderson Earle, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 1st day of July, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas, the above-named the Texas and Pacific Railway Company, is about to prosecute a writ of error to the United States circuit court of appeals for the second circuit, to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named Texas and Pacific Railway Company shall prosecute said writ of error to effect and answer all damages and costs, if it

fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By C. E. SATTERLEE, [SEAL.]
Sec'y and Treas.
NATIONAL SURETY COMPANY,
By CHAS. A. DEAN, *President.* [SEAL.]

Sealed and delivered and taken and acknowledged this first day of July, 1897, before me—
E. A. JACKSON.

Attest: RUFFIN A. SMITH, *Secretary.*

160 CITY AND COUNTY OF NEW YORK, *ss:*

On this first day of July, 1897, before me personally appeared Chas. A. Dean, president of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of New York; that he is the president of the National Surety Company; that he knows the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as president of said company by like authority; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 720, of New York Session Laws of 1893. And the said Chas. A. Dean further said that he is acquainted with Ruffin A. Smith and knows him to be the secretary of said company; that the signature of the said Ruffin A. Smith subscribed to the said instrument is in the genuine handwriting of the said Ruffin A. Smith and was thereunto subscribed by the like order of the said board of directors and in the presence of him, the said Chas. A. Dean, president.

JOHN E. MOONEY,
[SEAL.] *Notary Public, Kings Co.*

Certificate filed in New York Co.

(*Copy of By-law.*)

Be it remembered that at a regular meeting of the board of directors of the National Surety Company, duly called and held on the twentieth day of May, 1897, a quorum being present, the following by-law was adopted:

"Article XIII. SEC. 1. All bonds, recognizances, contracts
161 of indemnity and other writings obligatory in the nature thereof, shall be signed by the president, the vice-president, the second vice-president, a resident vice-president, or an attorney-in-fact, and, except when signed by an attorney-in-fact shall have the seal of the company affixed thereto, duly attested by the secre-

tary, assistant secretary, or a resident assistant secretary. The vice-president, second vice-president and resident vice-presidents shall each have authority to sign such instruments whether the president be absent or incapacitated or not; and the assistant secretary and resident assistant secretaries shall each have authority to seal and attest such instruments, whether the secretary be absent or incapacitated or not. All such instruments executed as herein provided shall be as binding upon the company as if the same were signed by the president, duly sealed and attested by the secretary."

CITY AND COUNTY OF NEW YORK, *ss:*

I, Ruffin A. Smith, secretary of the National Surety Company, have compared the foregoing by-law with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original by-law.

Given under my hand and the seal of the company at the city of New York this first day of July, 1897.

[SEAL.] RUFFIN A. SMITH, *Secretary.*

Approved as to form, and also as to sufficiency of sureties, with reservation, however, to the defendants in error of the right at any time to examine the proper officers of the surety company under oath, touching its assets, liabilities and financial condition generally.

July 21, 1897.

E. H. LACOMBE,
U. S. Circuit Judge.

162 (Endorsed:) U. S. circuit court. John Henry Clayton & o'rs *vs.* The Texas and Pacific Railway Co. Bond on writ of error. Surety. National Surety Co. U. S. circuit court. Filed Jul- 22, 1897. John A. Shields, clerk.

United States Circuit Court for the Southern District of New York.

JOHN CLAYTON ET AL.
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

To John Henry Clayton, Nicholas Roberts, Charles Anderson Earle, and Evarts, Choate & Beaman, their attorneys, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the second circuit, at New York, on the 19th day of August, 1897, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The Texas and Pacific Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness Hon. E. Henry Lacombe, judge of the circuit court of the United States for the southern district of New York, this
163 21st day of July, in the year of our Lord one thousand eight hundred and ninety-seven.

E. H. LACOMBE,
United States Circuit Judge.

Service of a copy of this citation is hereby acknowledged this 23d day of July, 1897.

EVARTS, CHOATE & BEAMAN,
Plaintiffs' Attorneys.

(Endorsed:) United States circuit court, so. dist. of N. Y. John Clayton *et al.*, plaintiffs, against The Texas and Pacific Railway Company, defendant. Citation. Rush Taggart, attorney for defendant, 195 Broadway, New York. John F. Dillon, counsel. U. S. circuit court. Filed Jul- 23, 1897. John A. Shields, clerk.

164 U. S. Circuit Court of Appeals, Second Circuit.

THE TEXAS & PACIFIC RAILWAY CO., Pl'ff in Error,
vs.
CLAYTON ET AL., Def'ts in Error.

WALLACE, *Circuit Judge:*

This is a writ of error by the defendant in the court below to review a judgment which was entered upon a verdict directed in favor of the plaintiffs upon the trial. The action was brought to recover damages alleged to have been sustained by the plaintiffs by the burning of 467 bales of cotton on the 12th of November, 1894, at Westwego, in the State of Louisiana.

The facts established upon the trial were that the plaintiffs, copartners at Liverpool, England, by the style of Newall & Clayton, through their agents, Castner & Co., at Bonham, Texas, delivered in October, 1894, to the defendant four lots of cotton for transportation, the contract being evidenced by four bills of lading identical in form except as to the number of bales, the marks on the cotton, and the numbers of the bills of lading. The material parts of the bills of lading were as follows: "Received by the Texas & Pacific Railway Co. * * * of Castner & Co. for delivery to shippers' orders or their assigns at Liverpool, England, he or they
165 paying freight and charges as per margin, — bales of cotton (here follow the number of bales and the marks), from Bonham, Texas, to Liverpool, England; route, via New Orleans and the Elder & Dem-ster & Co. steamship line (here follow the amount of freight and advance charges), upon the following terms and conditions, which are fully assented to and accepted by the owner, viz: (1) That the liability of the Texas & Pacific Railway Company, in respect to said cotton and under this contract, is limited to its own line of railway, and will cease and its part of this contract be fully performed upon

delivery of said cotton to its next connecting carrier, and in case of any loss, detriment, or damage done to or sustained by said cotton before its arrival or delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of such damage, detriment, or loss. * * * (6) That the said cotton shall be transported from the port of New Orleans to the port of Liverpool, England, by the Elder, Dem-ster & Co. steamship line, and with liberty to ship by any other steamship or steamship line, and that upon delivery of said cotton to said ocean carrier at the aforesaid port, this contract is accomplished, and thereupon and thereafter the said cotton shall be subject to all the terms and conditions expressed in the bills of lading and master's receipt in use by the steamship or steamship company or connecting lines by which said cotton may be
166 transported; and upon delivery of said cotton at usual place of delivery of the steamship or steamship line carrying the same at the port of destination the responsibility of the carriers shall cease." Two of the bills of lading were dated October 10th, one was dated October 15th, and one was dated October 23rd. There was an existing arrangement at the time between the defendant and the Elder, Dempster & Co. steamship line by which the former was to forward the latter during the months of October, November, and December, 1894, twenty thousand bales of cotton for transportation by the steamship line to Liverpool, and it was understood between them that the cotton was to be received by the steamship line at the defendant's wharf at Westwego. This wharf was at the terminus of a branch of the defendant's line of railway on the bank of the Mississippi river, and was built out over the river far enough so that cars could be run upon the tracks in the rear of the wharf and unloaded and vessels come to the front of the wharf and receive the freight thus unloaded. It was controlled exclusively by the defendant and used by it for the temporary storage of freight of all kinds brought over its railway and awaiting delivery to the consignees or for transportation by vessels. The course of business between the defendant and the steamship line was as follows: Upon the shipment of the cotton in Texas bills of lading would be issued to the shipper. Thereupon the cotton would be loaded in cars of the defendant and a waybill, giving the number and initial of the car, the number and date of the bill of lading, the date of the shipment, the
167 names of consignor and consignee, the number of bales forwarded on that particular waybill, the marks on the cotton, the weight, etc., would be given to the conductor of the train bringing the car to Westwego. Upon the receipt of the waybill and car at Westwego a skeleton would be made out by the defendant's clerks at Westwego, for the purpose of unloading the car properly, containing the essential items of information covered by the waybill and the date of the making of the skeleton. When this skeleton had been made out and the car had been side-tracked at the rear of the wharf the skeleton would be taken by the defendant's check clerk and he would proceed with a gang of laborers to open the car. The

cotton would then be taken from the car, examined to see that the marks corresponded with the items upon the skeleton, and deposited in one of the sheds upon the wharf designated by the check clerk, and the check clerk would mark upon the skeleton the location of the cotton. The sheds were subdivided into fifteen sections, and the location of the cotton was left to the check clerk. The skeleton would then be transmitted to the general office of the defendant, and the defendant would make out a "transfer sheet," containing substantially the information contained in the waybill, and transmit the transfer sheet to the steamship line. The steamship line upon receiving the "transfer sheet" understood that cotton for their vessels was on the wharf at Westwego and would collate the transfers relating to such cotton as was destined by them for a particular vessel, return the transfer sheet to the defendant, and advise
168 defendant what vessel would take the cotton. Thereafter the steamship company when it was ready to take the cotton would send the vessel, with their stevedores, to the wharf, the defendant's clerk would go with the master of the vessel and indentify and count out the particular lots of cotton designated for his vessel, the master would O K them, and the stevedores would thereupon take the cotton and put it on board the ship. Before the cotton left the wharf the defendant would obtain a receipt for it from the master of the ship.

The particular cotton involved in this suit had arrived and been unloaded upon the wharf at Westwego prior to November 5th, the transfer sheets had been transmitted by the defendant to the steamship line prior to November 10th, and prior to November 12th the steamship line had returned the transfer sheets to the defendant. The fire occurred upon the evening of November 12th. In the forenoon of that day the defendant gave notice to the steamship line that the cotton was upon the wharf, and requested the latter to come and remove it as soon as practicable. The fire took place without any fault or negligence on the part of the defendant.

Upon the facts thus established the defendant requested the trial judge to instruct the jury to find a verdict in its favor upon two grounds: First, that the evidence showed a delivery to the steamship line, the connecting carrier, and, second, that if there had not been a delivery to the steamship line there had been a tender of
169 the cotton to the connecting carrier, and therefore the defendant held the cotton simply as a warehouseman, and, there being no proof of negligence, was not responsible for the loss. The plaintiffs also requested the trial judge to instruct the jury to find a verdict in their favor. The trial judge refused the instructions asked for by the defendant, and directed the jury to find a verdict for the plaintiffs in the sum which had been stipulated as the amount of the loss. In directing a verdict the trial judge made the following observations: "As I understand the testimony, the steamship company had no business to come there to move the goods from one part of the dock to another nor to change the way in which they were placed upon the dock. They could come there during business hours and ask to have their goods pointed out to

them, and could then, by their employés, during business hours, at a time when the railroad company was willing that they should come, move the goods from a particular location to the steamer, giving a receipt for them; but aside from that I do not understand that they had any control over the goods. They certainly had no control over the dock as a dock. They had nothing to do as to determining whereabouts on the dock their goods were to be placed. If they were placed by post 29 when they arrived on Monday, they might be moved by the railroad company to post 43 on Tuesday without the permission of the steamship company and without consulting the steamship company. On the other hand, the steamship company could not move one bale on the dock from where it had been put to another place on the dock. It could only move
170 the goods from the dock to its ship, and then with the permission of the railroad company."

The only question presented by the assignments of error is whether the trial judge correctly ruled that upon the whole case plaintiffs were entitled to recover. It was assumed by both parties, each having moved that a verdict be directed, that there was no disputed question of fact for the jury.

In the absence of a special contract qualifying the ordinary obligations of a common carrier, when goods are delivered to a railway company for transportation to a destination beyond its own line through the intervention of a connecting carrier, it is liable as an insurer of the goods until it has delivered them to the connecting carrier, or unless by the refusal or inability of the connecting carrier to receive them it is justified in storing them, and has taken the necessary steps to occupy the relation of a warehouseman. Although the second carrier, after notice and a request to do so, has neglected for an unreasonable time to receive the goods, the first carrier must, to exonerate himself as an insurer, in some way clearly indicate his renunciation of the relation of carrier. Gould *v.* Chapin (20 N. Y., 259). It was said by the court in Railroad Co. *v.* Manufacturing Co. (16 Wall., 318), that "the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction. Public policy, however, re-
171 quires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route without delivering or attempting to deliver to the connecting carrier. If there be a necessity for storage, it will be considered a mere accessory to the transportation and not as changing the end of the bailment. It is very clear that the simple depositing of the goods by the carrier in his depot, unaccompanied by any act indicating an intention to renounce the obligation of a carrier, will not change or modify even his liability. It may be that circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them, but if he had reasonable grounds to anticipate the occurrence of these adverse circumstances when he received the goods, he cannot by storing them change his relation towards them."

What constitutes a sufficient delivery to the connecting carrier is sometimes a doubtful question. A manual transfer of possession is not essential. A constructive change of possession from the first to the second carrier may amount to a delivery. It may be safely affirmed as a proposition applicable to all cases that a deposit of the goods with notice, express or implied, at any place where the second carrier has control of them, conformably with usage created by the course of the business between the two carriers, is a sufficient delivery and discharges the first carrier. The liability of the second carrier begins when that of the first ends. Van Santvoord *v.* St. John (6 Hill, 157); Mills *v.* Michigan Central R. R. Co. (45
172 N. Y., 622). In Ætna Insurance Co. *v.* Wheeler (49 N. Y., 616), where connecting carriers had at the point of connection a warehouse used in common for the transfer of goods from one line to the other, the expenses of handling being paid in common, it was held that the delivery of goods there by one carrier, with notice to the other of their arrival and ultimate destination, placed them in the possession of the latter and subjected him to responsibility as a carrier. In Converse *v.* The Norwich Transportation Co. (33 Conn., 166) a railroad company and a steamboat company had a covered wharf in common at their common terminus, and it was the established usage for the steamboat company to land goods for the railroad on the arrival of its boats at night upon a particular place on the wharf, whence they were taken by the railroad company at its convenience for further transportation. There was no evidence of an actual agreement that the goods thus deposited were in the possession of the railroad company, but the court was of opinion that there was a tacit understanding that the steamboat company should deposit its freight at that particular place, and that the railroad should take it thence at their convenience. It was held that a deposit of goods accordingly by the steamboat company was a sufficient delivery to the railroad company, and a recovery against the former for the loss of the goods was reversed. In Pratt *v.* Railway Co. (95 U. S., 43) the Michigan Central R. R. Co. and the Grand Trunk R. R. Co. used a freight depot of the former, and when goods
were deposited by the latter in a certain part of the depot
173 destined over the road of the former they were set apart by the employés of the latter, and after they were so placed the employés of the Grand Trunk railway did not further handle them. After being so set apart, the Michigan Central R. R. Co. would obtain from the Grand Trunk Railway Company a list describing the goods and their ultimate destination and make out a waybill for their transportation over its own road. Certain goods which had been thus set apart for transportation over the line of the Michigan Central R. R. Co. were burned before they were loaded into its cars, but after it had obtained the descriptive list. It was held that there had been a delivery by the Grand Trunk Railway Company to the Michigan Central R. R. Co. The court said: "No further orders or directions from the Grand Trunk Company were expected by the receiving party. Except for the occurrence of the fire, the goods would have been loaded into the cars of the Michigan Central Com-

pany and forwarded without further action of the Grand Trunk Company."

In the present case the cotton had never been placed within the control of the steamship line by the defendant. It was not set apart from the other cotton on the wharf awaiting transportation by other steamship lines or vessels, further than by placing it when unloaded from the cars near certain numbered posts in the shed, where it might remain until called for or might be removed by the defendant to some other location to suit its own convenience.

Before the steamship line could have identified it for the
174 purpose of removal, and after that, before they could have exercised any control over it, the co-operation and assistance of the defendant was necessary.

There is no room for the contention that the defendant had ceased to be a carrier and become a warehouseman. It had done no act evidencing its intention to renounce the one capacity and assume the other. Although it had requested the steamship line to remove the cotton, it had not specified any particular time within which compliance was insisted on, and had not given notice that the cotton would be kept or stored at the risk of the steamship line upon failure to comply with the request. The request to come and remove it "as soon as practicable" was, in effect, one to remove it at the earliest convenience of the steamship line. There is nothing in the case to indicate that the defendant had not acquiesced in the delay which intervened between the request and the fire.

The bills of lading did not restrict the ordinary liability of a carrier who receives goods for a destination beyond its own line for transportation by a connecting carrier; on the contrary, the contract between the parties was carefully framed to adjust the liability of the carriers as between themselves and to protect the shipper in the event of a disputable custody of the goods. By its terms the carrier, and that carrier only, "in whose actual custody" the cotton should be was to be liable for any loss or damage to it whereby any

legal liability might be incurred. It was the manifest pur-
175 pose of this provision to define the rights of the parties to the contract in the event of doubt or dispute, and to make that carrier liable only who was in actual custody of the goods at the time of the loss, irrespective of the question whether there had been any constructive change of possession between the two carriers previously.

A verdict for the plaintiffs was properly directed. The judgment is therefore affirmed.

(Endorsed:) U. S. circuit ct. of appeals, second circuit. The Texas & Pac. R'y Co., pl'ff in error, *vs.* Clayton *et al.*, def'ts in error. Wallace, cir. judge. United States circuit court of appeals, second circuit. Filed Dec. 7, 1897. William Parkin, clerk.

176 United States Circuit Court of Appeals for the Second Circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANDERSON EARLE, Defendants in Error.

SIR: Please take notice that we shall move this court, on December 13, 1897, at 10.30 o'clock in the forenoon of that day, at the court-rooms of said court, in the United States court and post-office building, in the city of New York, for an order affirming the judgment of the circuit court in the above-entitled action, made and entered in said court on April 22, 1897, in all things, with costs to the defendants in error, and directing a mandate to issue to said circuit court in accordance therewith, and we shall at that time present for settlement, signature, and entry an order to that effect in the form and substance of the annexed order.

EVARTS, CHOATE & BEAMAN,
Attorneys for Defendants in Error, 52 Wall Street, N. Y. City.

To Rush Taggart, Esquire, attorney for plaintiff in error, 195 Broadway, New York city.

177 At a stated term of the United States circuit court of appeals for the second circuit, held in the court-rooms of the United States court and post-office building, in the city of New York, on the 13th day of December, 1897.

Present: William J. Wallace, Nathaniel Shipman, judges.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
against
JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANDERSON EARLE, Defendants in Error.

This cause having come on regularly to be heard on a writ of error to the circuit court of the United States for the southern district of New York, in the second circuit, from a judgment entered herein on the 22nd day of April, 1897, for $14,781.55:

Now, after hearing Mr. Rush Taggart and Mr. Arthur H. Masten, of counsel for the plaintiff in error, and Mr. Treadwell Cleveland, of counsel for the defendants in error, and due deliberation having been had, it is, on motion of Evarts, Choate & Beaman, attorneys for the defendants in error, ordered that said judgment of the circuit court be, and the same hereby is, in all things affirmed, with costs to the defendants in error, to be taxed, and that a mandate issue to the said circuit court in accordance herewith; issue of this mandate to be stayed for ten days.

W. J. W.

178 (Endorsed:) United States circuit court of appeals for the second circuit. The Texas & Pacific Railway Company against John Henry Clayton, Nicholas Roberts, and Charles Ander-

son Earle. Notice and order for mandate. Evarts, Choate & Beaman, 58 Wall street, New York city, attorneys for defendants in error. Service of a notice of motion, of which the within is a copy, and of a copy of a proposed order for mandate, of which the within is a copy, is hereby admitted. Dated New York, Dec. 8th, 1897. Rush Taggart, attorney for plaintiff in error. United States circuit court of appeals, second circuit. Filed Dec. 13, 1897. William Parkin, clerk.

179 United States Circuit Court of Appeals, Second Circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
against
JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANDERSON EARLE, Defendants in Error.

Assignment of Errors.

Now comes The Texas & Pacific Railway Company, plaintiff in error, and says there is error in the record and proceedings in the above-entitled matter in this, to wit:

First. That the said circuit court of appeals erred in affirming the judgment of the circuit court rendered against The Texas & Pacific Railway Company, plaintiff in error, and in favor of the defendants in error upon the trial of said cause.

Second. That the said court erred in holding that the circuit court committed no error in denying the motion of the Texas & Pacific Railway Company upon the trial of said cause to direct a verdict in favor of the Texas & Pacific Railway Company when the defendants in error rested their case.

Third. That the said court erred in holding that said circuit court had properly directed a verdict in favor of the defendants in error upon the trial of said cause.

180 Fourth. That the said court erred in holding that the circuit court was right in refusing to direct a verdict for the Texas & Pacific Railway Company upon the trial of said cause, at the conclusion of the testimony, as requested by said company, upon the ground that the testimony showed that said company had made a delivery of the cotton sued for to the connecting carrier, the Elder, Dem-ster & Company line of steamers.

Fifth. That the said court erred in affirming the action of the circuit court in refusing upon the trial of said cause to direct a verdict for the Texas & Pacific Railway Company at the conclusion of the testimony, as requested by said company, upon the ground that the Texas & Pacific Railway Company held said cotton sued for at the time of its loss as warehouseman and not as common carrier.

Wherefore the Texas & Pacific Railway Company prays that the judgment entered herein against it may be set aside and reversed,

and that a judgment in its favor may be entered as prayed in its answer.

RUSH TAGGART,
Attorney for Plaintiff in Error, No. 195 *Broadway,*
New York City.

(Endorsed:) United States circuit court of appeals, second circuit. The Texas & Pacific Railway Company, plaintiff in error, *vs.* John Henry Clayton *et al.*, defendants in error. Assignment of errors. Rush Taggart, attorney for plaintiff in error, 195 Broadway, New York. United States circuit court of appeals, second circuit. Filed Dec. 11, 1897. William Parkin, clerk.

181 Know all men by these presents that we, the Texas & Pacific Railway Company, as principal, and George J. Gould, as sureties, are held and firmly bound unto John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle in the full and just sum of thirty-two thousand dollars, to be paid to the said John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of ——, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a term of the United States circuit court in and for the southern district of New York, at the April term, 1897, in a suit depending in said court between John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle, plaintiffs, and The Texas and Pacific Railway Company, defendant, a judgment was rendered against the said Texas and Pacific Railway Company for the sum of fourteen thousand and sixty-eight dollars and the costs of said suit, in all fourteen thousand seven hundred eighty-one & $\frac{51}{100}$ dollars; and whereas the said Texas and Pacific Railway Company duly obtained a writ of error from the United States circuit court of appeals for the second circuit, which court, on the 13th day of December, 1897, rendered a judgment affirming said judgment in all particulars, and the said Texas & Pacific Railway Company having sued out a writ of error from the Supreme Court of the United States, and having obtained a writ of error and filed a copy
182 thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof:

Now, the condition of the above obligation is such that if the said Texas and Pacific Railway Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to

make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TEXAS & PACIFIC RAILWAY COMPANY, [SEAL.]
By G. E. SUTTERLEE, *Sec'y & Treas.*
GEO. J. GOULD. [SEAL.]

Sealed and delivered in presence of—
[SEAL.] E. A. JACKSON.
C. N. VEITCH.

Approved, and to operate as a supersedeas, by—
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) Texas & Pacific Railway Co. *vs.* Clayton *et al.* Bond on writ of error. United States circuit court of appeals, second circuit. Filed Dec. 22, 1897. William Parkin, clerk.

183 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 182, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Texas & Pacific Railway Company, plaintiff in error, against John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle, defendants in error, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 22nd day of December, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the said United States the one hundred and twenty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

184 UNITED STATES OF AMERICA, *ss:*

To John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the second circuit, wherein The Texas & Pacific Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be cor-

rected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 21st day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

185 [Endorsed:] Service of a copy of the within citation is hereby admitted. Dated New York, Dec. 22, 1897. Evarts, Choate & Beaman, att'ys for pl'ff.

186 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Texas & Pacific Railway Company, plaintiff in error, and John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle, defendants in error, a manifest error hath happened, to the great damage of the said The Texas & Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

Endorsed on cover: Case No. 16,765. U. S. C. C. of appeals, 2d circuit. Term No., 222. The Texas & Pacific Railway Company, plaintiff in error, *vs.* John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle. Filed December 28th, 1897.

No. 222.

Brief of Taggart for T. & P. Co.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 222

Filed Jan. 24, 1899.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS and CHARLES ANDERSON EARLE,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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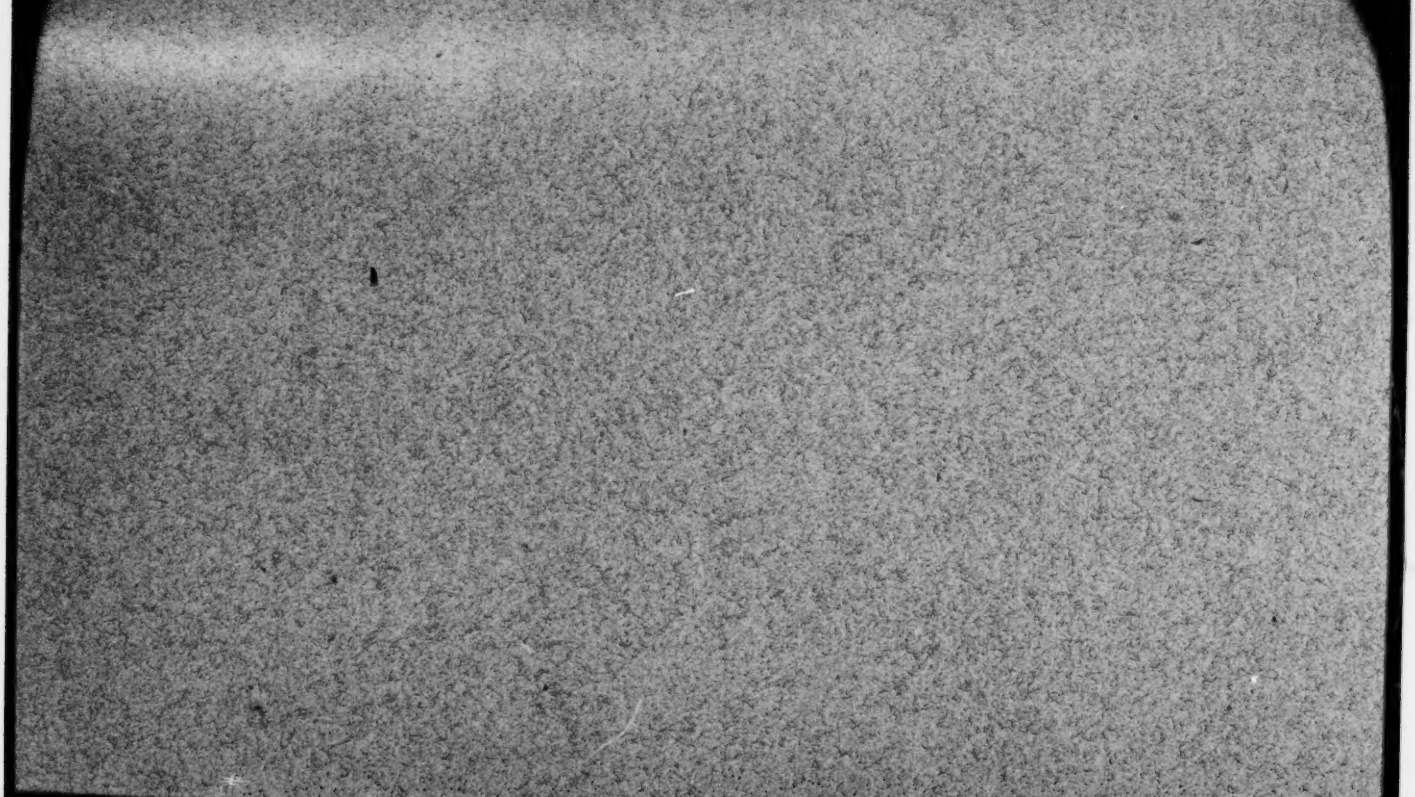

INDEX.

Supreme Court of the United States.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

AGAINST

JOHN HENRY CLAYTON, NICHOLAS ROBERTS and CHARLES ANDERSON EARLE,
Defendants in Error.

Statement of the Case.

This case comes into this Court upon a writ of error alleging error in the action of the Circuit Court of Appeals, in the Second Circuit, affirming a judgment which was entered upon a verdict directed in favor of the plaintiffs upon the trial of the case in the Circuit Court. The action was brought in the Circuit Court to recover $17,314.48 damages alleged to have been suffered by the plaintiffs, by the burning of 467 bales of cotton on the 12th of November, 1894, at Westwego, in the State of Louisiana.

Character of Pleadings.

The essential allegations in the complaint filed by the plaintiffs are that plaintiffs were cotton merchants doing business in the City of Liverpool, England, and the de-

fendant, as a railroad corporation, was engaged in conducting the business of a common carrier of merchandise for hire from various places in the State of Texas to Westwego, in the State of Louisiana; that in October, 1894, the plaintiffs delivered to the defendant as a common carrier at Bonham, Texas, 500 bales of cotton, which the defendant then and there received and undertook and agreed as a common carrier to carry from the place of shipment, to Liverpool, England, by way of New Orleans, and at Liverpool to deliver the same to the plaintiffs upon the payment of freight; that the defendant failed to keep this undertaking, and to carry 467 bales of said cotton as agreed; but that, through the negligence and carelessness of the defendant, and without fault of the plaintiffs, 467 bales of this cotton were, "on the 12th of November, 1894, wholly destroyed by fire at Westwego, in the State of Louisiana, at which time and place the same were in the possession of the defendant in the course of such carriage as a common carrier as aforesaid" (Record, p. 3.)

The answer of the defendant admitted its existence as a railroad corporation, and admitted the delivery to it of certain cotton, the number of bales specified, denied the undertaking to carry and deliver as alleged in the complaint; admitted the destruction of the 467 bales of cotton by fire at Westwego, in the State of Louisiana, but denied every other allegation relating to the loss of said cotton contained in the complaint (Record, p. 5.) Upon these issues the cause went to trial at the April Term of the Circuit Court in 1897, before the Hon. E. HENRY LACOMBE, Circuit Judge, and a jury.

Facts.

The facts developed upon the trial were that the plaintiffs were partners doing business in the City of Liverpool, England, under the firm name of Newell & Clayton; that in October, 1894, through their agents, Castner & Co., at Bonham, Texas, they delivered to the defendant the Texas and Pacific Railway Company four lots of cotton, the delivery being evidenced by four bills of lading, which were offered in evidence and which appear in the record, pages 91 to 99, inclusive. These bills of lading are identical in form, with the exception of the number of bales, the marks of the cotton and the numbers of the bills of lading. After offering the bills of lading in evidence, the plaintiff also offered proof of the value of the cotton, calculated according to certain stipulations entered into by the parties, and rested.

Thereupon the defendant moved the Court for a direction of a verdict for the defendant upon the grounds:

1st. That under the issues joined between the parties, the plaintiffs had failed to establish their complaint in its entire scope and meaning; and

2d. That under the issues in the case the plaintiffs had alleged that, at the time of the loss of the cotton, it was in the possession of the defendant as a common carrier, in the course of carriage from Bonham, Texas, to Liverpool, England, and that there was an entire absence of proof to sustain this allegation, which was denied by the defendant in its answer.

The motion for such direction, upon both grounds, was denied by the Court, and thereupon the defendant

introduced proof in its behalf respecting the shipment and handling of the cotton in question.

The facts as developed by the defendant were undisputed. The proof showed that all these bills of lading were based upon what was known as "Texas and Pacific contract No. 44" (Record, p. 46), which was in substance a contract with Elder, Dempster & Co., as steamship carriers, to connect with the Texas and Pacific Railway Co., and receive from that company 20,000 bales of cotton, during the months of October, November and December, 1894. The place agreed upon with Elder, Dempster & Co. for the receipt of this cotton by the steamship line was at the wharf at Westwego. The uncontradicted testimony of Mr. Sargent, general freight agent of the defendant, is that there was an express agreement between the steamship company and the defendant that the place of delivery of this cotton under this agreement was the wharf at Westwego (Record, p. 83). This wharf was at the terminus of a spur or branch of the defendant's line of railway on the bank of the Mississippi River, and was built out over the river far enough so that cars could be run upon tracks in the rear of the wharf and unloaded, and vessels come to the front of the wharf and receive the freight thus unloaded (Record, pp. 75-83). It was the property of the defendant.

Method of Business.

The testimony as to the method of transacting business between the railway company and the steamship company shows that upon the shipment of cotton, bills of lading would be issued in Texas to the shipper; that thereupon the cotton would be loaded in cars of the

railway company, and a way bill indicating the number and initial of the car, the number of the bill of lading, the date of shipment, the number of bales of cotton, the consignor, the consignee, the date of the bill of lading, the number of bales forwarded on that particular way-bill, the marks of the cotton, the weight, rate, freights, amount prepaid, &c., would be given to the conductor of the train bringing the car to Westwego (Testimony of Miller, p. 34; form of way-bill, p. 103); that upon the receipt of the way-bill and car at Westwego, a skeleton would be made out by the clerks at Westwego, for the purpose of unloading the car properly. The form of this skeleton is found at page 104, and contains the essential items of information covered by the way-bill, except that it had also the date of the making of the skeleton; that, when this skeleton had thus been made out and the car had been pushed in on the side track in the rear of the wharf, this skeleton would be taken by a clerk known as a "check-clerk," and with a gang of laborers, who actually handled the cotton, the car would be opened, and, as the cotton was taken from the car bale by bale, the marks upon it would be examined to see that they corresponded with the items on the skeleton, and the same were then checked; that the cotton thus taken from the car was deposited at a place upon the wharf designated by the check-clerk, where it would remain until the steamship company came and took it away (Testimony of Wilkinson, Record, p. 77); that, after the checking of the cotton in this way to ascertain that the amounts, marks and general information of the way-bill was correct, the skeleton would be transmitted to the general office of the Texas and Pacific Railway Company in New Orleans, which thereupon would make

out what it designated as a "transfer sheet" (the form of which will be found, Record, p. 105), which again contains substantially the information contained in the way-bill, and which was at once transmitted to the steamship company or its agents, and was a notification understood by the steamship company's agents that cotton for their line was on the wharf at Westwego ready for them to come and take away (Testimony of Miller, Record, pp. 48, 55; Testimony of Warrener, p. 84).

Upon the receipt of these transfer sheets, the steamship company would collate the transfers relating to such cotton as was destined by them for a particular vessel and advise the railway company, with the return of the transfers, that this cotton would be taken by the vessel named, and would thereupon send the vessel with their stevedores to the wharf at Westwego (Testimony of Miller, p. 48; Testimony of Warrener, pp. 84, 85). The clerk at Westwego would go around the wharf and by the aid of the transfers returned from the steamship agents point out to the master or the mate of the vessel, or the one in charge of the loading, the particular lots of cotton named in the transfers and designated for this vessel, and the stevedores and their helpers would thereupon take the cotton and put the same on board the ship (Record, p. 49). In connection with the loading upon the vessel or after the cotton was pointed out in lots, the master or mate would sign a mate's receipt for this cotton (*Id.*).

The stevedores and all men employed in loading the vessel were wholly in the employ of the steamship company (Testimony of Wilkinson, Record, pp. 77, 78). The times of coming to take cotton from the wharf

were wholly in the control of the steamship company. They sent for it as soon as they were ready (Testimony of Warrener, pp. 84, 85).

Facts as to this Cotton and its Loss.

The particular cotton involved in this suit had been shipped in Texas some weeks prior to the fire on the 12th day of November, 1894. The four bills of lading covering it, Nos. 28, 2[illegible], 35 and 61, bear date, respectively, October 10th, October 10th, October 15th and October 23d (Record, pp. 92, 93, 95, 97).

Nearly all of this cotton was received and unloaded upon the wharf at Westwego, and ready for its removal by the steamship company during the month of October. The last lot to arrive was received on the 3d of November, 1894, and the last lot was unloaded and placed on the wharf on the 4th of November (see Schedule A, Record, p. 107, where the dates of arrival and unloading of the various lots are tabulated).

Transfer sheets for most of the cotton involved in this suit and covered by the above bills of lading were sent to Elder, Dempster & Company in a letter bearing date November 2d (Record, p. 62) and the remainder of the transfer sheets were transmitted by letter bearing date November 9th (Record, p. 62).

The fire did not occur until the evening of November 12th. On that day a letter had been sent by Elder, Dempster & Company to the defendant (Record, p. 69) returning various transfer sheets covering 3,772 bales of cotton and directing their delivery to the S. S. "Leyden." The agent of the steamship company testified (Record, p. 86) that they then had no other transfers on hand, saying: "I think we had cleared every one out of the

office and sent them back to the T. & P. Railroad." The letter of November 12th covered transfers other than those involved in this suit, and it therefore follows that all the transfers covering the cotton now in question must necessarily have been returned to the Texas and Pacific office prior to November 12th, the date of the fire.

It thus appears that the cotton in question was for some time before the fire all in position ready to be taken by the steamship company from the place on the wharf where it had been unloaded, that the steamship company had been notified of that fact, and had acknowledged such notification, and signified its readiness to take the shipment.

Although the return of the transfer slips from the steamship company to the railway company was regarded as indicating the readiness of the former to load the cotton, as matter of fact the steamship company had not been ready for some days prior to November 12th, by reason of delays in the arrival of vessels, to take all the cotton which awaited shipment. The steamship "Leyden," for example, which was designated in the letter of November 6th (Record, p. 64) to receive the cotton therein referred to, did not, in point of fact, arrive on the wharf until about the 12th (Record, p. 86). Mr. Warriner, the steamship agent, says: "I don't know exactly now what was the reason. She was very late—she should have been in four or five days before that. She made a very long passage."

It further appears that on the very morning of the fire and on other occasions prior thereto, both in October and November, the officers of the railway company gave verbal notice to the steamship company that the cotton was upon the wharf ready for the steamship

company to take away, and made request that the same should be removed. The attention of the steamship company's officials was called to the amount of cotton on the wharf that they had contracted to carry, and they were requested to remove it at the earliest possible moment, and to comply with their contract. In reply, they said, in substance, that their ships had been delayed, the principal cause, however, being certain labor troubles with employees of the steamship companies, then existing in New Orleans, and also that some of their ships had been delayed by bad weather (testimony of Pearsall, p. 82).

No evidence was offered on the part of the plaintiffs tending to show any negligence of the defendant in connection with the wharf, or in connection with the fire causing the loss, or tending in any way to cause the loss.

At the close of the testimony the plaintiffs moved for a direction of a verdict upon the ground that the proof clearly showed that the cotton, at the time of the loss, was in the possession of the defendant as a common carrier and under the provisions of the bill of lading, that the defendant was responsible for its loss or destruction (Record, p. 87).

The defendant moved for a verdict upon two grounds, first, that the evidence showed a delivery to the steamship company, the connecting carrier; second, that under the facts, if there had not been a delivery to the steamship company, there had been a tender of the cotton to the connecting carrier, and that thereafter the railway company held the cotton simply as a warehouseman, and there being no proof of any negligence, that it would not be responsible as such (Record, p. 87).

The Court granted the motion of the plaintiff, denied the motion of the defendant, and granted exceptions to the motion to direct a verdict in favor of the plaintiff and to the denial of the motion on each of the grounds specified on behalf of the defendant.

Assignment of Errors.

Errors were assigned in the Circuit Court of Appeals as follows :

First. That the Court erred in denying the motion of the defendant to direct a verdict in favor of the defendant when the plaintiffs rested their case.

Second. That the Court erred in directing a verdict for the plaintiffs.

Third. That the Court erred in refusing to direct a verdict for the defendant at the conclusion of the testimony, upon the ground that the testimony showed that there had been a delivery of the cotton sued for to the connecting carrier, the Elder Dempster & Company line of steamers.

Fourth. That the Court erred in refusing to direct a verdict for the defendant at the conclusion of the testimony, upon the ground that the defendant's relation to the plaintiffs was that of warehouseman and not that of common carrier (Record, p. 108).

The assignments of error in this Court are as follows (Record, p. 119 :)

First. That the said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court rendered

against the Texas and Pacific Railway Company, plaintiff in error, and in favor of the defendants in error upon the trial of said cause.

SECOND. That the said Court erred in holding that the Circuit Court committed no error in denying the motion of the Texas and Pacific Railway Company upon the trial of said cause to direct a verdict in favor of the Texas and Pacific Railway Company when the defendants in error rested their case.

THIRD. That the said Court erred in holding that said Circuit Court had properly directed a verdict in favor of the defendants in error upon the trial of said cause.

FOURTH. That the said Court erred in holding that the Circuit Court was right in refusing to direct a verdict for the Texas and Pacific Railway Company upon the trial of said cause, at the conclusion of the testimony, as requested by said company, upon the ground that the testimony showed that said company had made a delivery of the cotton sued for to the connecting carrier the Elder, Dempster & Company line of steamers.

FIFTH. That the said Court erred in affirming the action of the Circuit Court in refusing upon the trial of said cause to direct a verdict for the Texas and Pacific Railway Company at the conclusion of the testimony, as requested by said company, upon the ground that the Texas and Pacific Railway Company held said cotton sued for at the time of its loss as warehouseman and not as common carrier.

POINTS.

I.

Upon the evidence in this case the defendant, the initial carrier, had fully performed the duty which it had undertaken in its contract of carriage by making delivery of the cotton to the next succeeding carrier.

(a) It had deposited the cotton in the place agreed upon between it and the steamship company as the place where freight intended for shipment by the latter would be received by it.

> *That title to the wharf was in the railroad company, and that the wharf was in general charge of its employees is immaterial. The wharf was, for purposes of delivery of cotton to steamship company, its wharf.*

(b) Notice of such deposit had been given to and acknowledged by the steamship company.

> *That the cotton had not been formally checked off and receipted for is not material.*

(c) When so deposited nothing further remained to be done by the railroad company to fulfill its obligations under the contract, and it rested in the discretion of the steamship company as to when and how the cotton should be removed.

> *The fact that the bill of lading contains the clause, "with liberty to ship by any other steamship or steamship line," is of no importance. That clause was for the benefit of the steamship company and imposed no duty on the defendant.*

II.

But assuming that there was not such a delivery to the steamship company as to release the defendant, we urge that upon the facts shown the defendants held these goods as warehousemen only—not as common carriers.

(a) The relation between connecting carriers is substantially the same as that between shipper and carrier. The notice given by the railroad company, and acknowledged by the steamship company should have been sufficient to make the former a warehouseman, under the authorities, as against a shipper.

(b) The provision in the bill of lading, fixing the liability on the carrier in whose actual custody the goods might be at the time of loss, does not upon the facts of this case fix a liability upon the defendant.

ARGUMENT.

I.

Under the evidence in this case, the defendant, the initial carrier, had fully performed the duty which it had undertaken in its contract of carriage.

The language of the contract is as follows:

"1. That the liability of the Texas & Pacific Railway Company in respect to said cotton under this

contract is limited to its own line of railway, and will cease and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier" (Record, pp. 91, 93, 96, 98).

The facts respecting the manner of shipment of this cotton are uncontradicted. The bill of lading fixes an entire rate of freight from the point of shipment to Liverpool, England. The entire rate or through rate of 111 cents per hundred pounds, under the provisions of Texas and Pacific contract No. 44, was divisible into two parts. The rate from point of shipment to New Orleans was the railroad's proportion, and the rate from New Orleans to Liverpool was the steamship company's proportion. By contract No. 44, the proportion secured to the steamship company was 49.21 cents per hundred pounds (Record, pp. 46, 55, 56).

Upon the trial and in the brief of the defendant in error below the claim was insisted upon that there was no delivery of this cotton to the steamship company for the reason that the bill of lading provides that the railway company should carry to the port of New Orleans and there deliver to the Elder, Dempster & Co. steamship line, and that Westwego under the proofs is shown not to have been within the legal limits of the custom-house district defining the port of New Orleans at this time. Therefore that the delivery to Westwego was not a compliance with the provisions of the bill of lading. We submit that this is entirely too narrow a construction of the provisions of this instrument. As a commercial instrument, it was to be construed in accordance with the conduct of commercial business at New Orleans and with the arrangements shown to exist between Elder, Dempster & Company and the railway company, and that a

delivery at the usual place, as the same was recognized not only by this steamship company but the other steamship companies, would be a compliance with this requirement of the bill of lading. That it was within the recognized commercial limits of the port as part of the "port of New Orleans," we refer to the testimony of Miller as to the custom of shipping there (Record, p. 70). Also, that the Board of Harbor Masters recognized Westwego as under their jurisdiction (Testimony of Roth and Cope, pp. 72, 73). The trial Court also considered it as included within the port of New Orleans by indicating that no further testimony need be given tending to establish the proposition (Record, p. 76). Evidently it was within the contemplation of the parties to this bill of lading that the point of connection of the two carriers' lines was to be the wharf at Westwego; and although the testimony does not, as we think, establish that Westwego was not within the legal limits of the port of New Orleans as defined by the Acts of Congress, yet we insist that, within the meaning given to this contract by the parties to it, the contract was performed by delivery at Westwego. It falls within the exact principle of the case decided by BROWN, J., in Devato against 823 Barrels of Plumbago, 20 Fed. Rep., 510, in which case a delivery at Brooklyn, under a bill of lading consigning the goods to the "port of New York," was held to be compliance with the requirements of the bill of lading, although Brooklyn was within another collection district.

Nature of Contract of Shipment.

The first question which arises is, What were the respective duties of the Texas and Pacific Railway Company, and the steamship company under and in view of the arrangements that had been made between them and by each of them with the shipper? The Texas and Pacific Railway did not contract to carry this cotton from Bonham, Texas, to Liverpool, England. This is indisputable under the decisions of this Court. The question was presented to this Court in Insurance Co. vs. Railroad Co., 104 U. S., 146. A dispatch company had entered into contracts with railway companies forming a continuous line for the shipment of freight, and one of the railway companies was sued under a bill of lading issued by the dispatch company, and it was claimed the companies forming this despatch line (or whose lines connected formed the despatch line) had undertaken jointly with the parties shipping over the line; but it was held that such arrangement did not involve joint liability, nor did the division of the aggregate pay for the entire route between the companies forming the line involve them as partners, but, on the contrary, each company under the arrangement simply undertook to transport over its own line and deliver to the next succeeding carrier, and that the defendant in the case had delivered the cotton involved in that suit to the next carrier, and the loss having occurred while it was upon this other carrier's line, it was not responsible.

In the case of Myrick vs. The Mich. Central R. R. Co. (107 U. S., 102), a similar ruling is made and a similar declaration is recorded as to the duty of the initial carrier. These cases follow and approve Rail-

road Co. vs. Manufacturing Co. (16 Wallace, 318), and Railroad Company vs. Pratt (93 U. S., 43).

It is to be noted, however, that, by the bill of lading in this case, Elder, Dempster & Company's steamship line was a party contracted with by the shipper at the same time that the Texas and Pacific Railway Co. was contracted with. By the sixth paragraph of the bill of lading it is provided that the cotton shall be transported from the port of New Orleans to the port of Liverpool by the Elder, Dempster & Company Steamship line (with liberty to ship by any other steamship or steamship line), and the bill of lading delivered to the shipper is signed by an agent for the railway and steamship lines severally, but not jointly. Under the provisions of contract 44 (Record, p. 46), this contract was fully authorized by the steamship company. The contracts of the shipper, therefore, were first with the Texas and Pacific Railway Company to carry from point of shipment to New Orleans; second, with the steamship line to receive at New Orleans, from the railway company as the agent of the shipper for that purpose, and carry thence to Liverpool, England, the cotton described in the bills of lading; the steamship company, on its part, as a common carrier, agreeing with the shipper to receive at its usual place of receipt of freight, and under the usual conditions, cotton destined over its route, which it had thus contracted to receive and carry. Was there delivery to Elder, Dempster & Co.?

This brings us to the first question upon which it is urged that the Court seriously erred in directing a verdict. The Court directed a verdict in favor of the plaintiff, upon the theory, as announced, that there had been upon the facts no delivery of this cotton to the

connecting carrier, the steamship company, and that under the terms of the bill of lading it was still held by the defendant, the defendant not having fully discharged its duty in the premises. The motion of the defendant to direct a verdict in its favor was based upon the claim that, upon the facts as presented in this case, and under a proper application of the principles of law relating to connecting carriers as established by the decisions of this Court, the defendant had fully discharged its duty, and had relieved itself from liability for this cotton, at the time the fire occurred on the 12th of November, 1894.

There can be no question about the fact that the connecting carrier in this case—the Elder, Dempster & Co. line of steamships—had made the wharf at Westwego the place of delivery of cotton to it. The testimony of Mr. Sargent shows that this was not a matter arising from custom, raising an implication of assent to such arrangement, but that there was an express understanding or contract to this effect (Record, pp. 71, 82). This arrangement as to place of delivery to the steamship line, related not only to the 20,000 bales of cotton to be shipped under contract No. 44, but to shipments under the other contracts of similar import which Mr. Miller testifies were made relating to other shipments during the season of 1894–5. This material fact, therefore, appears undisputed from the evidence, that Elder, Dempster & Co. had appointed the wharf at Westwego as the place of delivery of cotton to them for this season.

The second fact is likewise undisputed, which we deem material for consideration; viz., that Elder, Dempster & Co. determined for themselves when they would go to Westwego with their ships to take this

cotton, which they had arranged to have deposited for their line at that point, and carry it from there to Liverpool, Bremen or Havre (Testimony of Warrener, p. 84). It is likewise undisputed that the initial carrier, the Texas and Pacific Railway Company, had done everything in the way of the carriage of this cotton which it could do; that it had transported the cotton from the point of shipment in Texas to Westwego, and then had unloaded it from the cars in which it had been carried from Texas to the wharf at Westwego, and then all work in the way of the transportation of this cotton, or carriage of the same, was ended; that nothing more could be done by the Texas and Pacific Railway Co. except to point out the location of the cotton upon the wharf when Elder, Dempster & Company came to take it away for carriage over their line to its destination. In fact, it may be said upon this testimony that it was not the contemplation of the steamship company or of the railroad company, that anything should be done to this cotton after its being unloaded upon the wharf, and that, if both parties had promptly and expeditiously carried out the terms of contract 44, none of the cotton would have had to receive any attention whatever, after being unloaded from the cars and placed upon the wharf (Testimony of Wilkinson, p. 77).

It is also a conceded fact that all the labor of handling this cotton after it was placed upon the wharf, and of taking it aboard the ship, was entirely under the control of Elder, Dempster & Co., who determined when that labor would take the cotton from the wharf to the ship, and how, and all the details of that feature of the transportation (Record, p. 80). It is also an undisputed fact, as is shown by the correspond-

ence between Elder, Dempster & Co. and the Texas and Pacific Railway Co., that after the cotton was unloaded upon the wharf, and transfers were made out and sent to Elder, Dempster & Co. (which were notifications to them that the cotton was upon the wharf in position for removal by them), Elder, Dempster & Company determined which lots of cotton should be taken on board particular vessels, and assumed to direct the separation or choice of the cotton on the wharf to be loaded (Record, pp. 64, 65, 67, 69, 77–84). It is likewise an undisputed fact that all the cotton involved in this case had been unloaded, and Elder, Dempster & Co. had been notified of its unloading for a considerable period before the fire of November 12, 1894, the earliest deposit of this lot on the wharf being the 22d of October, and the latest, the 4th of November (Record, p. 107). Transfer notices for the most of the cotton had been delivered to Elder, Dempster & Co. on the 2d of November, and for the remaining portion of the cotton on the 9th of November, and they had returned such transfer sheets to the railroad company prior to the 12th of November, thereby signifying their readiness to take the shipments.

Upon these facts it is earnestly contended by the defendant that there was in law a delivery of this cotton to Elder, Dempster & Co., and that the Court should have so directed the jury. The question of what is delivery to a carrier by the shipper has been the subject of considerable discussion in the courts, and many cases involving that question have been before the courts for adjudication. A smaller number of cases involving the question of what constitutes delivery as between connecting carriers have been before the courts. That there should be any differ-

ence in the essentials of what constitutes delivery between two carriers in line, the one succeeding the other in the shipment of goods, the one's liability beginning where the other's liability terminates, and delivery in the first instance from the shipper, we are unable to conceive. In the case of the shipper, the liability of the carrier, it is settled, begins the moment the goods come into the possession of the carrier; the moment the carrier's duty with respect to carrying those goods begins, that moment the shipper ceases to be responsible for their safety, and the responsibility of the carrier begins. The same line of division, we imagine, must be the ultimate test as between connecting carriers. The first carrier occupies the position of agent of the shipper in making delivery to the next carrier after it has carried to the end of its route. When the first has discharged his duty, done all in the line of transportation that he can do, and has placed the goods in the control of the second, or by the deposit of the goods where the second carrier has by agreement or custom appointed for their delivery to him, or in whatever way, has cast upon the the latter duty of thenceforward carrying those goods, determining when they shall start upon their carriage and course, that moment the responsibility of the second carrier begins, and the responsibility of the first terminates. This seems to us clearly to be the result of the decision of this Court at least, and the principles of which, applied to this case, we believe, require a determination different from that arrived at by the Court below.

Analysis of Cases Upon Delivery by Connecting Carriers.

Let us analyze the leading case of Pratt vs. The Railway Co. (95 U. S., 43), and, as nearly as we can, get at the reason of the decision in the light of the authorities which are quoted in the opinion.

In this case the Grand Trunk Railway Co. was defendant, and the action was to recover damages for failure of duty as common carrier in respect to certain merchandise shipped from Liverpool to St. Louis, and carried by the defendant from Montreal to Detroit. At Detroit the defendant had no freight room, except a single apartment in the freight depot of the Michigan Central Railroad Company. This depot was a building several hundred feet long and three or four hundred feet in width, all under one roof but divided into sections or apartments. The railroad track upon which cars were to run to be loaded with freight was in the centre of the building. The only use which the defendant had of this section allotted to it was for the deposit of goods and property which came over its road, or were delivered for shipment over it. This section, in common with the rest of the building, was generally under the control of the Michigan Central Railroad Company. The defendant employed two men in this section who checked freight for it. Goods which came into the section from defendant's road, destined over the road of the Michigan Central, were, at the time of unloading from defendant's cars, deposited by the employees who unloaded them in a certain place in this section, from which they were loaded into the cars of the Michigan Central Company by its employees when they were ready to receive them. After they were so

deposited the defendant's employees did not further handle the goods. Whenever the agent of the Michigan Central would see any goods deposited in the section of the freight building set apart for the use of the defendant that were destined over the line of the Michigan Central, he would call upon the agent of the defendant, and from a way-bill he would take a list of the goods, and then for the first time learn their place of destination, together with the amount of freight charges due therefor. From this information a way-bill would be made up by the Michigan Central for the transportation of goods over its line of road, and not before.

The particular goods involved in this suit were, on the 17th of October, taken from the cars of the defendant and deposited in that part of the apartment or building used by the defendant, as the place for goods destined over the Michigan Central. When these goods were forwarded from Montreal, as was customary, a way-bill was made out in duplicate, on which was entered a list of the goods, names of consignees, place to which the goods were consigned and amount of charges. One of these way-bills was given to the conductor of the train carrying the goods, and the other forwarded to the agent of the defendant in Detroit. The way-bill accompanying these goods was given to the conductor, and on the arrival of the goods the conductor delivered his copy to the checking clerk of the defendant, who checked the goods from the cars. It was the practice of the Michigan Central Railroad Company before forwarding such goods to take from this way-bill the place of destination of the goods, a list of the same and to collect the amount of accumulated charges. *The Michigan Central agent had not*

called on the agent of the defendant to learn the place of destination of the goods, and no way-bill had been made out by the Michigan Central for the transportation of the goods over its line of railway. Upon these facts it was the opinion of the Supreme Court that these acts constituted a complete delivery of the goods to the Michigan Central, by which the liability of the Grand Trunk Company, the defendant, was terminated, for four reasons:

"1. They were placed within the control of the agents of the Michigan Company.

"2. They were deposited by one party and received by the other for transportation, the deposit being accessory, merely, to such transportation.

"3. No further orders or directions from the Grand Trunk Company were expected by the receiving party, and, except for the occurrence of the fire, the goods would have been loaded into the cars of the Michigan Central Company and forwarded without further action of the Grand Trunk Company.

"4. Under the arrangement between the parties, the presence of the goods in the precise locality agreed upon, and the marks upon them, 'P. & F., St. Louis,' were sufficient notice that they were there for transportation over the Michigan road towards the City of St. Louis; and such was the understanding of both parties."

The Court specially cite in support of this conclusion two Connecticut cases, also cited in a previous part of the opinion, which we think throw very considerable light upon the question we are considering. (Merriam vs. Railroad Co., 20 Conn., 354, and Converse vs. Transportation Co., 33 Conn., 166).

As indicating the understanding of the text writers as to what these authorities really mean, we quote Hutchinson on Carriers, 2d Ed., Sec. 90, as follows:

"But, while it is the undoubted general rule that the delivery, to bind the carrier, must be made either

to him or to some one with authority from him, or who may be presumed to have such authority, it is not to be understood that it is not subject to such conventional arrangements between the parties as they may choose to make in regard to the mode of delivery, or that it may not be varied by usage or by a particular course of dealing between them. They may make such stipulations upon the subject as they may see fit, and when such stipulations are made they, and not the general law, are to govern. If, therefore, the parties agree that the goods may be deposited for transportation at any particular place, and without an express notice to the carrier, such deposit will be a sufficient delivery; and proof of a constant and habitual practice and usage of the carrier to receive the goods when they are deposited for him in a particular place without special notice of such deposit, is sufficient to show a public offer by the carrier to receive the goods in that mode and to constitute an agreement between the parties by which the goods, when so deposited, shall be considered as delivered to him without any further notice. Such a practice and usage are tantamount to an open declaration, a public advertisement by the carrier that such delivery should of itself be deemed an acceptance by him, and to permit him to set up against those who had been thereby induced to omit it, the want of the formality of an express notice which had been thus waived would be sanctioning injustice and fraud. As where, for instance, the delivery was upon a private wharf or dock used exclusively by the carrier, and upon which it had been its custom and constant usage to receive goods left there for transportation by it, such deposit in the usual and accustomed manner would be constructive notice, and would be regarded as a sufficient delivery, though the goods *were not left in charge of any of its servants.*"

Referring to the cases themselves, in the Merriam case the facts were these: Plaintiff was owner of a box of goods to be shipped over defendant's steamboat and railroad line from New York to Meriden, Conn. The box was placed upon a dock in New York belonging to defendant at the usual place where freight destined for the boat was left. The box was lost, and

the railway company defended upon the ground that the box was not delivered to it; that its servants had no notice of the delivery of this box, and that it had never come into its possession. The Court say that no common carrier can be charged for the loss of property unless there has been delivery to the carrier; but that it being the constant, habitual practice and usage of the defendant to receive property at a dock for transportation in the manner in which it was deposited by the plaintiff, and without any special notice, such deposit was competent, and, in the case, sufficient to show a public offer by the defendant to receive property for that purpose in that mode; and that, if this property was delivered in accordance with such usage upon the dock at the place where the defendant was accustomed to receive the property, and take it away from there for carriage thereafter at its convenience, the deposit there by the plaintiff, even without notice to the defendant, was a delivery to the defendant of the property thus placed. They liken such deposit of property to the deposit of a letter in the post-office or foreign mail, and to a deposit of articles for carriage in a public box provided for that purpose by an express company.

In the succeeding case of Converse vs. Norwich and Northern Transportation Co. (33 Conn., 166), which is the case cited as special authority for the conclusions in Pratt vs. Railway Co., the facts were that the transportation company, defendant, was a common carrier between New York and New London. The wool, for the loss of which this suit was brought, was taken on board one of their vessels and carried to New London, put into the depot building on the wharf during the night of Saturday, May 7, and was destroyed by fire on the

afternoon of Sunday, May 8. The wool was bound for Stafford, Connecticut. The defendant and the New London and Northern Railroad Co. had an agreement by which they connected at New London. The railroad company had agreed to "build and furnish a good and "substantial wharf at New London on Water street, "of certain dimensions and for the use of such wharf, "depot building, &c., the transportation company and "the Norwich and Western Railroad Company are to "pay jointly to the New London and Northern "Railroad Co. an annual rent of $4,000." The goods were deposited by the defendants in the usual place of deposit for freight destined for points on the line of the railroad. *The common course of business in regard to such freight was for the defendants to make out a way-bill of the several articles brought to the dock and hand it to the agents of the road at New London shortly after the arrival of the boat.* The railroad company employees loaded the freight on their cars, taking it from the place where the defendant deposited it and checking each article on the way-bill as it was taken up. If any article described in the way-bill was not found, or was in bad order, the defendant looked it up, or put it in proper condition. In the case of through freight, the clerk of the boat transporting it was accustomed to make out a bill for the whole freight upon each parcel, and hand it with the way-bill to the agent of the railroad company at New London.

It does not clearly appear in the statement of facts whether these particular articles of freight were, in accordance with the custom, checked upon the way-bill by the agent of the railroad company, or that the way-bill had been delivered to the agent of the railroad

company as was customary; but a request to charge on the part of the defendant set out in the record would seem clearly to indicate that these things had not been done as to this particular shipment of goods, for we find (p. 172), the following request to charge:

"The defendants also claimed and requested the "Court to charge the jury that, if the goods of the "plaintiffs were not delivered to the New London and "Northern Railroad Company until they were checked "by that company upon the way-bill and put into their "cars, they were held by the defendant after they "were deposited in the depot in the customary "manner not as common carriers, but as warehouse-"men, and, therefore, the defendants were not liable "in this action."

Upon these facts the Court say upon the question of delivery to the railroad company (p. 181):

"It must be conceded that the defendants have transported the wool to their terminus, and carried and placed it in the common depot by the side of the railroad track, at a spot where they by usage were expected by the northern road to place it, *and that no other or further act of carriage or actual manual possession was or could be expected of them. And so it must be conceded that actual manual possession had not been taken by the northern road, nor is there any direct evidence of an express agreement that the carriage to, and placing at the side of the track, in the depot, should be deemed a delivery to the road.* And, at first sight, it would seem just and equitable to hold that the carriage in fact was finished by the transportation company, and that the goods were in deposit by mutual arrangement in a joint depot, to await an actual manual reception by the northern road at a future convenient hour; and so, looking to the equities of the case and the large amount involved in the other cases dependent upon the decision of this, we should be very willing to hold, if we could do so consistently with principle. But there are insuperable difficulties in such a view of the case.

"We have no difficulty in determining, indeed we must hold, that there was a mutual agreement or tacit

understanding equivalent to such an agreement that *the transportation company should place the through freight at that precise spot, and that the northern road should take it from thence at a time convenient to them.* The construction of the depot and the uniform usage are conclusive of it. The depot was constructed with a platform by the side of the track for the reception of goods to be taken from or put into the cars; and on that platform the railroad company, in the first and every instance of delivery by them, placed their freight, *and the transportation company at their convenience took it away and carried it on board their boat. And so the transportation company in like manner, in the first and every instance, placed there the freight for the northern road, and they at their convenience put it in their cars and took it away.* And the usage was precisely the same with the Worcester road. It would be a forced construction of this usage, or rather the agreement inferable from it, to say that an intermediate joint deposit was contemplated. Moreover, the depot was not the joint depot of the two parties only, or erected for that purpose only, but the joint depot of three, including the Worcester road, and erected for and used by each, not only for the mutual delivery and reception of through freight, but independently in transacting their independent local business. Again, the defendants were carriers by water, and their place of landing and delivery must necessarily or would naturally be a wharf. This depot was a wharf, covered and enclosed indeed, but still a wharf, and the only one occupied by them. Upon this wharf and into the enclosure the northern road laid their track for the delivery and reception of freight to and from the transportation company. Both parties then contemplated a delivery and reception on this wharf and in this enclosure, and obviously in the precise manner actually pursued. *If a carrier by water notifies the consignee of his arrival and readiness to deliver the goods, and the consignee says to him 'land them in a particular place, on a particular wharf, and I will take them away at my convenience,' and he so lands them, it is a delivery.* And what he says in a particular case expressly he may say for all cases and by his conduct or by usage. And so these connecting carriers practically if not expressly said to each other. It is clear then that both the transportation company and the northern road contemplated

that a placing of freight by either intended for the other upon that platform was all that either was to do by way of delivery of their freight to each other; that they did not contemplate such placing as an immediate deposit, to be watched by the party depositing, or as a joint deposit, at the joint risk and in the joint possession of both; but that they relied on the enclosure as a protection, and considered the placing of the freight in the usual spot upon the platform as a delivery.

"The minor facts respecting the time and manner of delivering the way-bills—the examination of the freight and checking of the way-bills to be sure that all had been delivered—the proportionate extent and manner of their joint use and possession of the depot—the looking up or paying for missing goods—and the practice of letting the Saturday freight remain on the platform until Monday morning—are only material as they bear upon the great question, namely, what was it agreed or understood between the defendants and the northern road should constitute a delivery from one to the other?"

Result of Analysis.

If we stop now at these cases and carefully consider them, it seems evident that the common principle which is found in the three cases is that which is first enunciated in Merriam vs. Hartford and New Haven R. R. Co., that the carrier becomes liable upon the delivery of the goods to it, and that, as stated in the Converse case, if the carrier either expressly, or, as the result of custom, says to the shipper, "*Land your goods for me in a particular "place, on a particular wharf, and I will take them "away at my convenience," that then the landing of the goods at that place is a delivery to the carrier, who has thus stated his readiness to receive them.* That this is the principle underlying the decision of Pratt vs. Railway Co. is shown by the case of The Illinois Central Railroad Company vs. Smyser & Co. (38

Ill., 354), which is also cited with approval in the body of the decision. In this case the facts developed this mode of doing business: Williamson, Haynes & Co., commission merchants at Cairo, Ill., received cotton from the steamboat a few days prior to the 23d of October and piled it on the open levee in the rear of their wharfboat. The mode of doing business then at Cairo was: When warehousemen have cotton to ship by rail they apply to the company for the requisite number of cars, and they are sent on the side-track of the company to the warehouse, and the shipper there loads the cotton upon the cars and makes out a manifest and leaves it with the agent of the company, *who has the bales counted, and, if found to be correct, a bill of lading is signed* and a locomotive sent to remove the loaded cars and to place them in the train destined to the point to which shipment is made.

On the morning of the 23d, Williamson, of the firm of Williamson, Haynes & Co., gave notice at the office of the company that he had a carload of cotton to ship, and requested a car for that purpose. A car was taken down on the side-track to a point opposite his boat, about 10 A. M., and left in charge of Williamson, Haynes & Company, and during the day they loaded the cotton into the car. The agents of the defendant were notified at their office in Cairo that the cotton was loaded on the car, and manifests of the number of bales and amount of charges were presented to the agents on the evening of the same day at their office. *The cotton was left standing on the side-track where it was loaded, but the bales had not been counted and no bill of lading or receipt had been given for it.* On the morning of the 24th of October the cotton was consumed by fire, com-

municated to it, as supposed, by a spark from a passing locomotive. The action was brought by the plaintiffs, who were the owners of the cotton, to recover for the loss thus occasioned.

It was contended on behalf of the defendant that the cotton at the time of its destruction was in the possession of Williamson, Haynes & Co., and was not in the possession of the railroad company, and that it had not yet received it either as a carrier or for safe-keeping. This contention was founded upon the fact that the agent of the company had not counted the bales, or made out a bill of lading, or accepted the cotton by the issue of a receipt or bill of lading, and that only after this was done, the universal custom was for the company to send a locomotive and remove the car from the possession of the shipper to the company's main tracks. The Court says, Chief-Justice WALKER delivering the opinion (p. 381):

"It is not the mere signing a bill of lading which transfers the possession of freight to the company, but it is the evidence that they have received possession. Their possession may be shown by any other legitimate evidence. The liability of the common carrier is fixed by accepting the property to be transported. If, however, goods are placed on his cart, boat or car without his knowledge or acceptance or that of his agent, he is not liable (Angell on the Law of Carriers, Sec. 140). If the owner or person having the custody of the goods to be shipped never parts with their possession, or does not place them under the control of the carrier, there is no bailment, and consequently no liability incurred *(Ibid.)*. But in this case the company by their acts accepted the trust. The cotton was not placed in the car without their knowledge, but it was with their express assent. Had the employees of Williamson, Haynes & Company placed the cotton on the platform of the depot, with the assent of the company to be transported, no one would doubt their liability, and yet in principle no difference is perceived."

Railway Co. vs. Murphy, 60 Ark., 333, is a case upon its facts very similar to the case last cited. In that case, as in the Illinois case, the company placed upon a side-track at a flag-station an empty car to be loaded with cotton, and its custom after loading the car was to remove the car upon notice given by the shipper of its destination, and that it was ready for removal, and subsequently to issue a receipt and bill of lading. In that case the car had been loaded and notice of the fact of loading had been given to the agent of the next station below, where such notice was customarily given. The cotton was set on fire while awaiting removal by a train.

The Court in the opinion gave controlling force to the fact that the cotton was deposited at the place appointed by the carrier, and that the shipper had done all that was in his power and all that the company required before shipment; that the moving of the car with the cotton from the place, designated by the carrier for its reception, awaited solely the convenience of the carrier. As in the Illinois case, the furnishing of the name of the consignee and the place of destination, the counting of cotton by the carrier and the issue of its receipt or bill of lading therefor--all were deemed immaterial circumstances as bearing on the question of delivery; it was held that the delivery was complete when the cotton was deposited by the shipper in the place customarily designated by the carrier as the place where cotton destined for carriage over its line would be received, and when so deposited it was in the discretion of the carrier as to when, and how it would take the cotton away from that place.

In the case at bar, the Court, in directing a verdict,

gave force—not to the fact which this Court in Pratt vs. The Railway Co., or the Courts in the cases cited with approval in that opinion, gave force to, to wit, the deposit of the goods upon a wharf or at a place which the carrier had designated as the place where it was willing to receive goods and take them away at its convenience—but to the fact that a receipt had not been signed; that the bales had not been counted; that although the cotton was upon the wharf at Westwego subject to the direction of Elder, Dempster & Co., and it was for their exclusive determination when and how it would be removed, yet, inasmuch as it had not been counted, and formally receipted for, and remained upon a wharf owned by the defendant, that no delivery had been made to the Elder, Dempster Company, although the first carrier had fully performed all the carriage and all the manual possession and holding and handling that was necessary in and about the carriage to the point where Elder, Dempster & Co. agreed to receive it. In the opinion of the Circuit Court of Appeals, the conclusion upon this branch of the case is summarized in the one paragraph:

"In the present case the cotton had never been placed within the control of the steamship line by the defendant. It was not set apart from the other cotton on the wharf awaiting transportation by other steamship lines or vessels, further than by placing it, when unloaded, near certain numbered posts in the shed, where it might remain until called for or might be removed by the defendant to some other location to suit its own convenience. Before the steamship line could have identified it for the purpose of removal, and, after that, before they could have exercised any control over it, the co-operation and assistance of the defendant was necessary" (Record, p. 117).

It may be noted that in all of the cases cited the formal acts of transfer had not been attended to. In the

Pratt case the way-bill had not been consulted to obtain destination of the goods, and to collect the charges upon the goods. Thus in the Merriam case no receipt was given for the box delivered upon the dock; in the Converse case the way-bill had not been delivered and checked, as also was the case in the Pratt case; in the Smyser case the bales of cotton had not been counted nor bills of lading issued, as was customary, yet in all these cases the fact of delivery was held not to be dependent upon these formal acts.

Undue stress seems to be laid both by the trial Court and by the Circuit Court of Appeals upon these immaterial formal matters. Thus the trial Court in directing a verdict thus seeks to distinguish this case from Pratt vs. Railway Company and Converse vs. Transportation Company:

"The dock was the dock of the Texas and Pacific Railway Company. They deposited the goods upon the dock and sent the transfer slip, and all these various documents passed. What was the condition of the goods put upon the dock from that time on, so far as the steamship company was concerned? As I understand the testimony, the steamship company had no business to come there to move the goods from one part of the dock to another, nor to change the way they were placed upon the dock. They could come there during business hours and ask to have their goods pointed out to them; could then by their employees during business hours, at a time when the railway company was willing that they should come, move the goods from the particular location to the steamer, giving a receipt for them. But aside from that I do not understand that they had any control over the goods. They certainly had no control over the dock as a dock. They had nothing to do as to determining whereabouts on the dock these goods were to be placed. If they were placed by post 29 when they arrived on Monday, they might be moved by the railroad company to post 43 on Tuesday, without the permission of the steamship company at all;

without consulting the steamship company. *Per contra*, the steamship company could not move one bale on the dock from where it had been put to any other place on the dock. It could only move the goods from the dock to the ship and then with the permission of the railroad company " (Record, pp. 89, 90).

This is quoted with approval in the opinion of the Judge delivering the decision of the Circuit Court of Appeals (Record, pp. 114, 115).

If these conditions are material as distinguishing this case from the case of Pratt vs. Railway Company, then it is material to ascertain just how far they are sustained by the testimony in the case. We think an examination of the testimony upon this point will show that it is a very imperfect statement of the facts as presented in the record.

The testimony upon the subject is given by two witnesses, A. L. Wilkinson (Record, pp. 75–80), and C. G. Miller (Record, pp. 31–39). Mr. Wilkinson was the employee of the defendant specially in charge of the wharf at Westwego for some time prior to the fire of November 12, and presumably better informed than any one else upon this subject. His testimony upon the subject is very definite, and is as follows:

" We had a particular shed for cotton destined for a particular place. We tried to divide it off so that we could berth a vessel, and when she came there to get the cotton she could take it from the most convenient point, saving trucking a long way. As to different points for different destinations, we had the east end No. 2 Shed, or down river end, full of Bremen cotton—had been there quite a while—and we had Havre and Genoa toward the middle of the two sheds, and the bulk of Liverpool in No. 2 Shed, some of it in No. 1. After unloading cotton in this way, it was left there for the ship to come and get it. When a ship came to get the cotton as a rule generally the NewOrleans office sent up a list of the cotton that the ship was to take; sent it up to our office. Then

when the ship berthed, the purser or whoever was assigned to the cargo, would take the cargo from the wharf, would come in, we would locate the lots of cotton and go there with him and count them as they stood in the sheds, he would O. K. it and then the longshoremen would break down the cotton, take the trucks to the river front and from that into the screw, and put it into the ship. These longshoremen were in the employ of the stevedore who loaded the ship and the screw men also. What I have described was the regular method of dealing with Elder Dempster & Co. and the other steamship companies; that is the regular routine of the work. It was during the time I was there.

"By the Court:

"Q. When the ship's purser went there, he went there with some of your clerks? A. Yes, sir; just to count them.

"Q. And when the ship's representative was there, not only the ship's representative was there, but your representative was there? A. Yes, sir.

"Cross-examination by Mr. Cleveland:

"Our representative showed the ship's representative where the cotton was. He had no location; we had to show it.

"Q. Was the wharf in the exclusive possession of the railroad company as far as you know? A. It was the general wharf for any ship that wanted to come and get cotton.

"Q. But the railway employes were the persons on the dock? A. We employed the men on the dock. When anybody came there on the deck of the dock it was generally understood that they had permission of the railroad company. They have landed there without permission of the railroad company, I suppose."

On further cross-examination the witness says:

"When a ship arrived at Westwego and the purser or the mate came on the dock, he would come to the office in regard to the delivery of the cotton to be shipped. I mean in my office, and the cotton was pointed out to him. I or some of my employees went around to the different points and pointed out the cotton. I did not necessarily receive any paper from the ship or the ship's officers. They would come and ask for the cotton. They would likely have the paper

downtown, unless we got a message over the 'phone to give them any cotton they wanted. I got the mate's receipt for them before they left the wharf. I never know of a bale of cotton leaving that wharf without a mate's receipt being given for it, except it was an oversight. I received messages over the 'phone to deliver cotton. The messages came from the New Orleans office and also from the steamship agent, to give the ship what it could take, or not to give her certain lots; that she could not take it; her space was engaged elsewhere. As a rule my orders came from the New Orleans office. I worked under the New Orleans office.

"By the Third Juror:

"Q. I want to know, after the cotton had been delivered off the cars on the dock, who paid the expenses of handling it up to and including the time it was given to the ship? A. We paid the expenses of the cotton to put it on the dock on to the wharves.

"Q. From the time it was delivered on to the dock from the car, who paid the expenses up to and including its delivery to the ship? A. What do you mean by delivery to the ship—taken aboard of the ship?

"Q. Handing to them? A. The ship paid for taking it out of the shed. We were not even allowed to put in a man to help them without they paid 50 cents an hour. We only paid fifteen."

Record, pp. 77, 78, 79, 80.

Mr. Miller's testimony is less definite, for the simple reason that as agent of the defendant in New Orleans he was only occasionally at the dock at Westwego. He says (Record, p. 49):

"Upon the arrival of the vessel at the dock the employees of the railway company at Wetswego, in company with some one of the ship's employees—the mate, probably—would go around and count the various lots of cotton that were there, and the mate would give us what is termed a 'mate's receipt' for that cotton before loading it on the vessel.

"Q. At or shortly prior to the arrival of the steamship the cotton designed for that steamship would be brought out on the dock by the railroad employees, would it not? A. Not necessarily; that would depend where the cotton was, and in a number of instances the mate of the steamer would receipt to us for

it, and the steamship labor would truck the cotton from where we had it on the dock to the vessel."

Also on page 50:

"After the receipt from the steamship company of these transfer slips with marks of lots of cotton upon them, if it should be necessary to get the cotton out, that would be attended to by some of the railway employees at Westwego, as to locating the cotton and getting it out. It was not necessary to get it out at all times; it was on the wharf. It was all over the wharf; it was usually stored inside of the railway track toward the land. I do not know that I issued any specific order to any one in respect to getting out that cotton. It was understood we would get out cotton when necessary to do it. By getting out cotton I mean trucking it from where it was originally stored on the wharf out in front, or near enough in front to enable the steamship people to get it out without having to go around other piles of cotton. When that was done at all, it was usually done after the receipt of the transfer slip from the steamship company. Whether it was done at all, depended on the location of the cotton on the wharf. In some instances it was done and in some instances it was not done.

"Q. Do you mean that before the receipt of the transfer slip from the steamship company the cotton that was destined for a steamer was put between the wharf and the river?

"A. No, sir, not necessarily. I simply mean that if cotton which Elder, Dempster & Co., for instance, sent a steamer there to get, was where they could get at that cotton, and if there was no obstruction of any consequence between where this cotton was stored that they went there to get and the ship's side, in that case we had nothing to do in getting it out; they took it from where it was located; it was not necessarily gotten out by the employees of the railway company in the majority of instances after the receipt of the transfer slips from the steamship company" (Record, p. 51).

This is all the testimony on the subject and scarcely justifies the conclusion of the trial Court and of the Court of Appeals that the steamship company could only come there at designated times and under per-

mission of the railway company, and when it came that it always required further acts and conduct on the part of the defendant railway company before this cotton could be taken possession of and put on shipboard by the steamship company. The acts of pointing out cotton were simply the identification of the particular lots which the steamship company, exercising its discretion of selecting from among all of the lots of cotton on the dock, selected for the particular ship, and were of the same character precisely as the acts of the agent of the Michigan Central in the Pratt case, calling upon the checking clerk of the Grand Trunk Railway Company and getting the marks of the goods, destination, charges, &c., prior to reshipping the goods in all cases ; or as in the Converse case, of calling upon the Transportation Company's clerk and the Transportation Company's clerk pointing out the goods, checking the goods by the way-bill and practically receipting formally for the goods. These acts, while proper for an orderly method of transaction of business as between the steamship company and the railway company, ought not to control the liabilities of these parties in view of the express understanding between them that the wharf at Westwego was to be for the purposes of cotton shipment, the place of receipt by the Elder Dempster Company steamship line, of cotton which the Texas and Pacific Railway Company would move to that point, and would unload for them and which they would call for and receive at such times as they saw fit. The permission of the railway company was embodied in the original general contract, and made the wharf for the purposes of these shipments the wharf of Elder, Dempster & Company.

Great stress is put also by the trial Court and also

by the Circuit Court of Appeals upon the fact that all the employees on the dock were the employees of the railway company. This is true in a sense, and in another sense it is not true. All the employees employed in unloading cars and placing the cotton upon the dock in the places designated by the checking clerks were employees of the railroad company; but all the employees who came there for the purpose of loading cotton from the wharf to the ship, as Mr. Wilkinson testifies, were the employees of the steamship line, and when on the dock, so far as appears, they had full control for all purposes necessary to gain the object for which they were there; to wit, the taking away of cotton from the wharf and placing it aboard the vessel.

Other Cases Illustrating the Principle of Pratt vs. Railway Co.

The principle of law which we contend underlies Pratt vs. The Railway Co., and which was thus misconceived by the Court upon the trial of this case is very clearly set forth in other authorities by the State and Federal judiciary.

Thus where a railroad company erects a platform for the purpose of shipping cotton and its course of business is such as to induce parties to store cotton on it for shipment by next freight train, and a party does so store it there for shipment, and the train passes and neglects to put it on, and it is destroyed during the delay by fire caught from the sparks from the company's engines, the company is liable for the loss, upon the theory that it has been received by it, and is in its custody and control (Meyer vs. Vicksburgh Railroad Company, 41 Louisiana Ann., 639).

The case of Montgomery & Eufaula Ry. Co. vs. Kolb, 73 Ala., 396, is a clear case showing that a carrier may be responsible for freight delivered although in direct disobedience of its regulations for the receipt of freight. In this case the superintendent of the defendant had issued instructions for the conduct of its business, requiring all cotton to be delivered accompanied with instructions as to marks and shipper and no receipt to be issued for cotton until the cotton was upon the platform of the company, and accompanied with proper shipping directions. This cotton was delivered in the yard without shipping directions and upon evidence that such a course of business was followed at this particular station and much of the cotton received there was received in the same way, the company was held responsible for this cotton, although no notice of the deposit of the cotton had been given to the defendant. The opinion quotes with approval Hutchinson on Carriers, Secs. 90 and 91 (quoted *ante*, p. 24), as to what constitutes delivery to a carrier.

Note that in this case express directions had been given to the agent as to the manner in which cotton should be received. These directions had been disregarded in this instance, and the sole basis upon which the company's liability was determined was that it had been the custom of the agent at the station to allow goods to be deposited alongside of the platform from time to time, and that these goods were deposited in that manner, and without notice to the agent of the railroad company. The opinion cites with approval Section 91 of Hutchinson on Common Carriers, stating the rule as to the liability of the carrier upon freight,

under circumstances such as obtained in 38 Illinois, 20 Conn., and 33 Conn.

In Green vs. the Railroad, 38 Iowa, 100, the plaintiff sent her trunk properly labeled with her name and destination to the depot of the company during business hours in the evening, intending to take passage on its train the next morning, and the company's employees being at supper, the drayman put the trunk down in the waiting room without notice to any of them, as he had often done before, which was proven to have been the custom with passengers intending to leave by the morning trains. It was held that when the trunk was thus deposited it was at the risk of the company, and it having been burned during the night, the company was held liable :

"That the delivery may be made at the proper time of receiving such baggage under the express assent or authority of the carrier, without notice to its employes, will not, we presume, be disputed," said the Court. "It is equally clear upon principle that this assent may be presumed from the course of business or the custom of the carrier. Upon evidence of this character contracts based upon business transactions are constantly established. * * * There was evidence tending to show a course of business on the part of the defendant, a custom to receive baggage left at the station house, as in this case, without notice to defendant's servants. Upon evidence of this character it was proper that the facts should have been left to the determination of the jury whether there had been a delivery of the property within the rules above announced; whether a course of business, a custom, had been established to the effect that a delivery of baggage at the station house, without notice, was regarded by defendant as a delivery to its servants, and whether plaintiff's trunk was received under this custom."

See, also, Green vs. The Railroad, 41 Iowa, 410.

The rule as between the shipper and carrier is thus

clearly stated by Hutchinson on Carriers, 2d Ed., Sec. 99:

"When the owner of the goods has done all in his power and all that he is required to do by his understanding with the carrier or the usage of the business to further shipment, and it becomes then the duty of the carrier to do whatever else is necessary to put them *in transitu*, the delivery and acceptance will be considered as complete from the time the carrier is informed that they are ready for him. As, where it was the course of business for a railroad company, when required to do so, to send its cars to a sidetrack at the place of shipment to receive cotton for transportation, and for the shipper there to load upon them the freight and make out a manifest and leave it with the agent of the company, who then had the bales counted, signed bills of lading and sent locomotives to remove the cars thus loaded and place them in the train destined to the point to which the shipments were to be made, it was held that the delivery was complete as soon as the cotton was put upon the company's cars in this manner by the shipper and the company's agent informed of the fact."

Hutchinson on Carriers, Sec. 99, citing Ill. Cen. R. R. vs. Smyser, 38 Ill., 354.

This principle is quite well illustrated in the case of Coyle vs. Great Western Railroad Company, 47 Barb., 152. In this case the plaintiff, a brewing company, was in the habit of delivering goods to the defendant, the railroad company, at East Albany, and was in the habit of sending receipts with the last load of the particular shipment or shipments at all times prior to this occasion, and before the shipment in each case the goods were receipted for and entered in the books of the railroad company in accordance with the shipping order and receipt which would be sent with the last load. *On the occasion in question the goods were sent, but were not thus receipted for, and were not tallied by the receiving clerk of the railroad company, and it does*

not appear that the receiving clerk had knowledge of the presence of these goods at the station. The shipment was not entirely complete, and in the night intervening before the completion of the shipment the goods were burned in the warehouse; notwithstanding the absence of the receipt and the incompleteness of the shipment, the defendant was held liable. MILLER, J., says:

"The delivery was complete, so far as the plaintiff was concerned, as he has nothing more to do. The taking of the receipt for the property was not essential to complete the delivery. It was for the plaintiff's benefit, and the defendant cannot complain because he thus failed to protect himself by a written acknowledgment of the delivery instead of relying upon verbal proof of that fact should it be required, nor do I think that anything remained to be done by the consignee or his agent after the delivery of the property to the railroad company before they were ready to transport it. The counting, checking and entering the property upon the books of the company for shipment were matters connected with the course of business of the defendant which were for the benefit and protection of the railroad company, which could not in any way affect the delivery. Suppose these had all been entirely neglected and the goods had been shipped before they were sealed and had been lost or destroyed, would the defendant have been exonerated? Certainly not, for the very apparent reason that these were acts of the defendant and the plaintiff could not be made to suffer by their omission."

The same principle is applied in Insurance Co. vs. Railroad Co., 144 N. Y., 200, where it is held that the liability of the railroad company as a carrier began notwithstanding it was the duty of the shipper to load the freight into the cars when they were furnished by the carrier. The principle upon which the decision goes is that the liability of the common carrier begins when the goods are delivered to him at the place ap-

pointed, or provided for their reception in a fit and proper condition ready for immediate transportation. The goods in this case were hay, which was unloaded in bales at the defendant's freight house at Cape Vincent, but where the shipper was to load it into the defendant's cars. The cars had not yet been furnished,and the claim of the defendant was that its responsibility as a common carrier had not attached to it at the time of the fire, and could not until the shipper had completed the work of loading. Upon this question EARL, J., says (205):

"There is no doubt that it is the duty, generally, of a railroad company to load the freight delivered to it for transportation into its cars, and that it cannor generally devolve this duty by any regulation upon the shipper; and that it cannot legally, as a condition of transportation generally, exact from the shipper a contract to place the freight into its cars. But we know from our own observation that as to hay, lumber, sawlogs, and other bulky freight, the shipper usually loads the freight into the cars. We need not, however, now decide whether a railroad company can, as to such bulky freight, make a regulation that the shipper shall load it, because here the shippers acquiesced in the regulation and undertook the duty of loading. *But we do not think that the fact that the shipper undertakes to load the freight into the cars necessarily postpones the time when the railroad company takes on the character of a common carrier.* The rule as to the responsibility of the carrier is laid down in varying phraseology in a variety of cases, as follows: To render a common carrier liable for goods to be carried by him, the fact that the goods were actually delivered to him or to some person authorized to act in his behalf, must be established. His liability attaches only from the time he accepts the goods to be carried. To complete the delivery of goods to the carrier it is essential that the property be placed in a position to be cared for, and under the control of the carrier or his agent, with his knowledge and consent. *The liability of a railroad company as a common carrier of goods delivered to it attaches only when the*

duty of immediate transportation arises. So long as the shipment is delayed for further orders as to destination of the goods, or for the convenience of the owners, the liability of the company is that of warehousemen. The liability of a common carrier for goods received by him begins as soon as they are delivered to him, his agents, or servants, at the place appointed or provided for their reception when they are in a fit and proper condition and ready for immediate transportation. If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage and for the purpose of facilitating it, his liability as a carrier will commence with the receipt of the goods. But on the contrary, if the goods when so deposited are not ready for immediate transportation, and the carrier cannot make arrangements for their carriage to the place of destination until something further is done or some further direction is given or communication made concerning them by the owner, or consignor, the deposit must be considered to be in the meantime for his convenience and accommodation, and the receiver until some change takes place will be responsible only as a warehouseman."

The Rule as Between Connecting Carriers Similar to that Between Shipper and Carrier.

The relation between connecting carriers is substantially the same as that between shipper and carrier (Railroad Co. vs. Railroad Co., 82 Kentucky, 541). The test of delivery from the initial carrier to the connecting carrier should be the same as the delivery by a shipper to the carrier. In a case in its facts substantially identical with the case at bar the principle we contend for here was applied by the Court of Appeals of New York (Insurance Co. vs. Wheeler, 49 N. Y., 616). In this case the action was brought to recover the amount of insurance paid by

the plaintiff upon a quantity of flour shipped at Milwaukee for Boston, and alleged to have been destroyed by fire at Ogdensburgh, while in possession of defendants, as common carriers. The flour was shipped upon one of the boats of the Northern Transportation Company, which company ran a line of propellers from Milwaukee to Ogdensburgh, where it connected with the Northern Central Railroad for Boston. This road was run and operated by the defendants; the railroad and propeller line ran in connection with the defendant's railway under a *pro rata* agreement as to freight. The contract of shipment was dated at Milwaukee, July 12, 1864, and was as follows:

"Shipped in good order and well-conditioned by A. "J. Hale, as agent and forwarder, for account and risk "of whom it may concern, on board the propeller "'City of New York' (C. J. Chadwick, Master), now ly- "ing in the port of Milwaukee, and bound for Ogdens- "burgh, the following articles, marked and numbered "as per margin, and which are to be delivered in like "good order and condition (the leakage of oils, molas- "ses, liquors and other liquids, and the dangers and "accidents of navigation, fire and collision excepted), "without delay unto consignees at Ogdensburgh, paying "freight and charges." In the margin was "H. & W. "Chickering, Boston, Care George A. Eddy, agent, "Ogdensburgh."

The transportation company had an agreement with the defendants, who were in possession of and operating the railroad running east from Ogdensburgh, to transport over their lines through freight in connection, and divide the compensation as provided by the agreement. The transportation company contracted for the carriage of the flour to Ogdensburgh only, but the freight for the entire carriage was $1.10 per barrel. This was divided between the transportation company and the defendant.

An examination of the original record of this case in Cases in Court of Appeals, Abb. Ann., 1872-73, Vol. 187, of the Law Institute Library, shows almost an exact counterpart of the case at bar, upon the facts. A very concise statement of the facts of the case is contained in the report of the Referee, A. B. James. It is as follows:

There was an arrangement between the said Northern Transportation Company and defendants that all freight brought by cars going west, and all freight brought by propellers going east was to be handled and transferred by the former at the price of 30 cents per ton, each paying half, and that such handling consisted in taking the freight from the car and putting it on the wharf ready for the boat when prepared to receive it, and from the boat and putting it into the warehouse ready for the cars when sent to receive it; that the warehouse used was the property of said defendants as trustees, rented to the Northern Transportation Company; that the mode of business on the receipt of property by the N. T. Co., after having it transferred from the boat to the warehouse, was to notify the defendants of the fact, giving the specifications of the property, its destination, quantity, rate and amount of back charges, *and, when the cars were sent for it, to tally it out and deliver it to the employees of the defendant, by whom it was received and placed upon the cars for transportation;* that defendants were duly notified of the arrival of this flour and its destination, but in consequence of the deficiency of cars to do the business thus presented, occasioned by some of their cars having been impressed for Government use, they were, without fault or negligence, unable to and did not send any cars to receive said flour, and said

flour never came to the possession of defendants as carriers or otherwise.

The testimony of the various witnesses brings the case still closer to the facts of the case at bar. Thus Dennis P. Gardner testified that he was the tally clerk to tally freight off of propellers and to the railroad; he had charge of the crew who piled the freight into the sheds or warehouses and locked the warehouse at night, keeping the key in the office of the N. T. Co. The flour was in warehouse marked "No. 1;" he was in the employment of the N. T. Co. and had headquarters in its office; when he did not have the keys, left them in the office of the Northern Transportation Co.; when the freight was landed no one in the employ of the railroad was there to take account of it; the railroad company first took note of property when loaded on to cars; no one that I know from the railroad had any knowledge of any property until it was loaded and when freight was loaded into the cars the tally clerk of the railroad first took account of the property.

The testimony of Philo Chamberlin was as to the arrangement respecting the use of the wharf; and D. W. C. Brown, assistant superintendent of the Northern Road, testified that the final conversation between Chamberlin, Eddy and himself was that, "We (the "Railroad Company) would pay them 15 cents per ton "to handle and deliver to our cars," which he testified later was accepted; then the warehouse, he testified, was rented by the N. T. Co.; and on cross-examination he testified to having an account with the N. T. Co. for rent and for the 15 cents per ton for handling the freight.

Julius Beahse, tally clerk for the railroad company,

testified that he received freight from the N. T. Co. and saw it properly loaded, too, the whole of it; he took account of the freight from the order sent in from the N. T. Co., copied from the order into the tally-book, then went to the warehouse and got the goods; that Gardner had men to handle the flour: "Gardner "kept tally of the flour as well as I did; the men got "their pay in the N. T. Co.'s office. Gardner or some "of the clerks of the N. T. Co. had the key of the "warehouse."

Gardner, recalled, also testified that "No one tallied "the freight unloaded from the propellers until we "loaded it into the cars;" that he did not always tally; that he sometimes took Beahse's tally.

The Referee found (as did the trial court in the case at bar) that the flour had never come into the possession of the defendant, and that it never entered upon any duty or duties as carrier in relation to it, and was therefore not liable for its loss.

This conclusion was reversed by the General Term, which conclusion was affirmed in the Court of Appeals.

The question presented in the case was precisely the same as though in the case at bar Elder, Dempster & Co. had been sued instead of the railway, and they had defended upon the ground of want of delivery of the cotton to them. The Court of Appeals, in considering the case upon the facts, say through Grover, J.:

"The further fact that the bargain for this service was made with Chamberlin by the Transportation Company was immaterial. The service performed by him was in the common business of both, and he was paid by each equally therefor, and must be considered in the employ of both. *The title to the warehouses was not material. They were used by both parties for the transaction of this business, and, the defendants owning both, to equalize the matter, rent for one was paid by*

the Transportation Company to the defendants, but both were used by the parties for the transaction of the business. It is the use of the warehouse that is to be looked at, and not the title in determining the question. I have looked outside of the findings for some of the facts, for the reason that the case is referred to in the findings for this purpose. What is said about the key being kept when out of the possession of an employee of Chamberlin in the office of the Transportation Company, by the witness, is not material, as there is no pretense but that property placed where this was, was taken and transported by the defendants at their pleasure. The case shows that notice of the arrival of this property and its destination was given by the Transportation Company to the defendants, by whom it was entered on their books for transportation. The flour remained in the warehouse for eight days after this, for the reason that the defendants had not cars for its transportation, when with the warehouse it was destroyed by an accidental fire. In *Coyle vs. The Western Railroad Corporation* (47 Barb., 152) it was held that placing barrels in the usual place of delivery to a forwarder for transportation, which were received by persons in its employ, a part with the knowledge of the agent, though not counted, tallied or receipted for, as had been usual between the parties, placed them in its possession as a common carrier. In *Converse vs. The Norwich Transportation Company* (33 Conn., 166) it was held that when a company engaged in the transportation of goods by water, in connection with a railroad company, for through rates, divided between them, and the usage was for the boats upon arrival to deposit such goods upon a covered wharf used in common, and for the railroad to take such goods from there for transportation, that a deposit by the boat, according to the usage was a delivery; and that the water line was thereby discharged from further responsibility. (see, also, *Mills vs. The Michigan Central Railroad*, 45 N. Y., 622.) In the present case the flour was not only deposited in the usual place, but notice was given to the defendants, who entered it upon their books. *From this time it must be held to have been in the possession of the defendants as common carriers.*"

In the case of Conkey vs. Milwaukee & St. Paul Railway Co. (31 Wis., 619), a leading case in support of the

continued liability of the first carrier, DIXON., C. J., giving the opinion of the Court, very clearly states (notwithstanding the initial carrier was held liable upon the facts of that case), that in a case presenting facts similar to the case at bar, he would have treated the goods as having been delivered by the first to the second or succeeding carrier. Thus he says referring to the decision in Wood vs. Railway Co., 27 Wisconsin, 541 *(post* page 79.*)* (p. 630):

"That usage, now become universal, or very nearly so, is for the railway company receiving the goods destined for a place beyond the terminus of its route to transport them over its own road and then deliver them to the next company or carrier in the line of transit, collecting from the latter its own charges for freight and transportation, whereupon the latter becomes invested with a lien upon the goods for the charges so advanced in addition to his rates or charges for the transportation and delivery to the next succeeding carrier, who, in turn, advances the charges of the two that have preceded, and thus the process continues and is repeated until the goods have reached their place of destination and are in the hands of the last carrier, ready for delivery to the consignee or owner, subject to payment to such carrier of the accumulated charges of all the preceding carriers over whose routes they have been transported.

"Now, it was upon this well-known custom and usage, amounting as it does to an implied contract or promise on the part of each succeeding carrier to pay back charges and receive and carry forward the goods brought to it by the preceding one, that I relied as constituting the true ground of action or liability against the succeeding carrier, in case he unreasonably failed to receive and carry forward the goods according to his implied contract or obligation, and as he had held himself out as ready and willing and promising to do. That contract or obligation, I then thought and still think, created a liability on his part co-extensive with and similar in nature to his liability as a common carrier, in case he neglected or refused, in proper time and according to the usual course of business, to receive the goods, and they were afterwards, and before

coming to his possession, lost or destroyed. *I then looked upon his liability, and still do, as being in extent the same as if the loss or destruction had been of the goods in his custody and possession as a common carrier. It was to my mind like the case of goods delivered to a carrier for transportation and which were destroyed before the transit commenced. By the law of common carriers, their liability is fixed on receipt of the goods, and if they are lost in the warehouse of the carrier or elsewhere before the carriage commences, the carrier must respond, unless the loss was caused by a force superior to and beyond human agency and foresight, or by the public enemy, the onus of showing which is upon the carrier (Blossom vs. Griffin, 13 N. Y., 569; Ladue vs. Griffith, 25 N. Y., 364). I regarded the goods when separated and set apart in the accustomed place in the warehouse, and ready for delivery, by the preceding carrier, and after a reasonable time had elapsed for the succeeding one to receive them, and when, in the due course of business, he should have done so, as being pro hac vice, if need be, in the warehouse of the latter awaiting transportation by him, or, if necessary for the purpose of the remedy, constructively in his possession as a common carrier.*

"Such were the views which I then entertained, and I have as yet discovered no good reason for changing them. I then thought and still think, that the loss, if possible, should be made to fall on the carrier in fault, or him who appeared most so, and it was for this reason I assented to the rule that the last carrier should be held responsible as such, only until a reasonable time had elapsed for the next carrier to receive the goods, and not after that time."

The Foregoing Principles Applied to this Case.

Applying the principles of these cases to the case at bar, it seems impossible to arrive at any other conclusion than that the cotton which, from October 22 to November 4, was deposited upon the wharf at Westwego, had completed its transportation from Bonham

to New Orleans; and the fact that the cotton was from the moment of deposit upon the wharf awaiting the pleasure of Elder, Dempster & Co. to send their ships and take it away; and the further fact that this dock was the agreed place for delivery of this kind of goods to Elder, Dempster & Co.; and that Elder, Dempster & Co. had notice of the presence of this cotton upon this dock, had received the transfers of the cotton, and had returned them, bring the case at bar, as we insist, within the precise principle of the case of Pratt vs. The Railway Company, cited *ante*.

The sole distinction which the trial Court sought to make between the case at bar and Pratt vs. The Railway Company, namely, that the title to the dock was in the Texas and Pacific Railway Company, is held, in Insurance Company vs. Wheeler, to be wholly immaterial, as indeed it must be when carefully considered. It was, as DIXON, C. J., says, *pro hac vice*, the dock of Elder, Dempster & Co. for the purposes of receiving freight by them. By their agreement with the Texas and Pacific Railway Company, and the use which they had made of it prior thereto they had made it, for the purposes of delivering cotton shipped under such contracts, their dock, and as GROVER, J., says, in Insurance Co. vs. Wheeler, it was the use that was the determining factor and not the title in the dock or the wharf; nor does the further fact which is stated in the direction to the jury, that the dock was in the general control of the employees of the Texas and Pacific Railway Company, modify the rule in any way. In Insurance Co. vs. Wheeler, the warehouse at Ogdensburg was in the general control of the employees of the Transportation Company, who kept the same locked, and kept the keys

in that company's office, and yet the defendant railway company was held liable for flour in the warehouse.

For the purposes of shipments by Elder, Dempster & Co., it was in the control of their employees, for the testimony is that they could go there at their pleasure and take possession of this freight without any hindrance or action on the part of the Texas and Pacific Railway Company, and control the dock to the extent that was necessary to enable them to load the cotton on board their ship. That is to say, the agreement between the parties being that this was the point for reception of freight by Elder, Dempster & Company, common carriers, a part of that contract was the control of that dock by Elder, Dempster & Company, so far as the same was necessary for the reception of such freight, and its loading upon their vessels, and the course of business clearly demonstrates that it was so understood and acted upon by the parties.

The further fact upon which the Court relies that this cotton was counted, checked and a receipt given therefor at the time when Elder, Dempster & Co. came for it, under the principle as announced in 38 Illinois, Converse vs. The Railroad Co., and Pratt vs. The Railway Co., should have no controlling force, and none is given in those cases to these mere incidental circumstances. In those cases, as strongly as in this, was it urged upon the Court that delivery was dependent upon such circumstances, but the Court say that delivery is not made dependent upon the transmission of a paper from one person to another, the counting of the goods and the tallying of them; but the fundamental fact that the carrier had designated a particular place where it would receive freight, and that the de-

posit of the freight at those places (without notice in most of the cases, but clearly when there was notice, as in the case of *Insurance Co. vs. Wheeler*), brought the goods within the possession of the carrier, who had made the designation, and that the giving of these papers, or the withholding of them, was a matter that concerned the convenience of the parties, their security as between themselves, and an orderly course of business and nothing more.

The Circuit Court of Appeals considered that the case at bar was within the principle decided by Court of Appeals of New York in Goold vs. Chapin, 20 N. Y., 259. There is a clear distinction between the facts of that case and the case at bar. In that case the defendants were common carriers from New York to Albany, and carried the goods to Albany and there unloaded them from the vessel to a float belonging to them, which belonged solely to them, and was used solely by them to deliver to canal boats. While there they made one or more requests of the connecting carrier to stop and take the goods from the float, which was not done, and a fire occurred, and they were consumed. It was held that there was no delivery to the next carrier, and that the first carrier was still responsible. This is treated by the Circuit Court of Appeals and by the defendants in error as being a case exactly similar to the case at bar.

The distinction between that case, and the case at bar on the facts is this : the float on which the goods were at the time of the fire was the first carrier's, and was used only for its purposes. The calling for them by the second carrier and taking off of the goods was merely an accommodation to the first carrier, in lieu of requiring it to take the goods to the second carrier's

wharf or warehouse. The float was in no sense whatever the float of the second carrier, not even in the use made of it. The second carrier had never, by contract or otherwise, agreed to it as a place of delivery of goods to it as a carrier. In the case at bar the express contract of Elder, Dempster & Co. was to make the Westwego wharf its place of delivery to it of the cotton, and this fact distinguishes widely the case at bar from the facts of the case of Goold vs. Chapin, and brings it exactly within the principle of the later case in the same Court of Insurance Co. vs. Wheeler, and also of Pratt vs. Railway Co. in this Court. This distinction was entirely overlooked by the Court of Appeals (Record, pp. 115, 117). The Court of Appeals even consider that the railway company defendant acquiesced in the delay as the first carrier was held to have done in the Goold vs. Chapin case. In the Goold vs. Chapin case the first carrier asked the second carrier to call for the goods as an accommodation to it. There being no obligation on the part of the second carrier to do this, the delay while the first carrier was waiting for compliance with its request was justly treated by the Court of Appeals as acquiescence in the delay.

But in the case at bar, the notice to Elder, Dempster & Co. was not simply a request. It was a demand to them to discharge an obligation and was put in that form. Thus, Mr. Pearsall, the superintendent of the defendant, testifies :

" The substance of the conversation was, first, the amount of the cotton on hand at Westwego for Elder, Dempster & Company which was stated, and the importance of moving the cotton was stated by me, and they were requested to make every effort to move it at

the earliest possible moment, *and to comply with their contract.* The exact words of their conversation I don't remember, by the sense of it was that their ships had met with great delays in New Orleans on account of the labor troubles that they had. At that time there was considerable trouble between the steamship agents and the cotton-screw men. They were on a strike—the screw men—*and they gave that as an excuse for not carrying out their contract of removing the cotton*" (Record, p. 81).

II.

The Court should have directed the jury that, under the undisputed facts in this case, the defendant held these goods, if at all, only as warehouseman and not as common carrier.

The question of the relation of an initial carrier to an intermediate or second carrier to whom goods must be delivered for transportation has been the subject of considerable discussion, and the authorities are by no means clear as to the rule to be adopted when the first carrier has completed the carriage and has brought them to a point where it is the duty of the second carrier to receive them, and the second carrier fails to perform his duty. Of course, if there has been a delivery to the second carrier, then the initial carrier's liability has ceased; but, prior to such delivery, what is the measure of the duty of the initial carrier; what is the extent of his obligations?

It seems clear that as to the second carrier the first carrier occupies a position of agent of the shipper, and

as a forwarder is bound to the exercise of reasonable diligence. Thus a recent writer defines the duty of a connecting carrier as follows:

"Reasonable diligence must be used to deliver or "tender goods by the carrier to the next succeeding "carrier" (Ray, Sec. 383, citing Burroughs vs. Railroad Co., 100 Mass., 26; Whitworth vs. Erie R. R. Co., 87 N. Y., 413; Dunham vs. B. & M. R. R. Co., 70 Me., 164; Regan vs. Grand Trunk Ry. Co., 61 N. H., 579).

Again, in the same authority, page 388:

"The carrier will be liable without a reasonably "diligent attempt to secure their forwarding, in ac- "cordance with the terms of shipment."

Initial Carriers Relation to Goods After Carriage.

THE AUTHORITIES REVIEWED.

Still, the question remains, What is the relation of the first carrier to the goods, assuming that it has discharged its duty of carriage and seeks to relieve itself of further liability? What must it do? It seems clear from the authorities that it is not sufficient simply to transport to the end of its line and place in a warehouse. But is it not sufficient when, as in this case, it has transported to the end of the line, and has tendered the goods, by giving notice of the deposit of the goods at the place where the connecting carrier is accustomed to receive freight, and thus made what is equivalent to a tender? Is this not sufficient to relieve it of its strict obligations as a carrier, and change its obligations to those of a mere forwarder, holding for the purpose of forwarding, as a mere warehouseman? Some authorities, we are aware, hold that there are

reasons why, in the course of a long carriage, the initial carrier should not be permitted to relieve itself of the obligations of a carrier. But we think that these authorities, when examined, will be found to show that in the particular cases decided, elements which should relieve the carrier from its strict common law liability were not present, and in almost all the cases there has been a suggested qualification of the rigid rule, in case certain facts existed, leaving the real question still to be decided, when it should arise upon facts like those in the case at bar.

Thus, in a case which is sometimes cited as a leading case upon the subject, Condon vs. The Railroad Company, 55 Mich., 218 (COOLEY, J., giving the opinion of the Court), the first carrier was held responsible upon facts showing that it had simply set the goods in its warehouse where the next carrier could get them, and where the next carrier was in the habit of getting them when it was ready to carry them, but where no notice was given to the second carrier, and nothing indicating that the first carrier wished to be relieved of them, and have the second carrier take away the goods, or the equivalent of tender. In the opinion there is a clear intimation as to what would have relieved the first carrier:

"Thus the shipper delivers his goods to a carrier who becomes an insurer for their safe transportation, and if the operations of one carrier cover a part only of the line of transit, and another is to receive the goods from him, the shipper has a right to understand that the liability of an insurer is upon some one during the whole period. The duty of the one is not discharged until it has been imposed upon the succeeding carrier, and this is not done until there is a delivery of the goods, *or at least such a notification to the succeeding carrier as, according to the course of business, is equivalent to a tender of delivery.* There is nothing in this

which is burdensome to the carrier, for this is the customary method in which the business is done, and the rule only requires that the customary method shall be pursued without unreasonable delay or neglect."

It may be noted that in this case, CAMPBELL, J., dissented, holding that, upon the facts of the case, showing the course of business as between the two companies, the next or succeeding carrier must have been held to a knowledge of the presence of these goods, and therefore that the defendant in this case could only be held subject to the liability of a warehouseman.

In Whitworth vs. The Erie R. R. Co. (87 N. Y., 413), the defendant was sued to recover the loss of 428 bales of cotton shipped at Memphis for Liverpool for transportation over defendant's road and destroyed by fire while in its freight house at Jersey City The bills of lading of the Erie and Pacific Dispatch and the Great Western Dispatch Company under which the cotton was shipped, contained provisions limiting the liability of the carriers, and among others, the provision that the companies and their connections should not be liable for loss or damage to the property by fire while in transit or while in deposit or place of transshipment or at depots or landings at any point of delivery. ANDREWS, C. J. (p. 417), says, respecting these bills of lading:

"The bills of lading were through contracts; that is, contracts for the carriage of the cotton from Memphis, the place of shipment, to Liverpool, England, at a fixed rate for the whole distance. The Oceanic Steam Navigation Company was a party to the bills of lading of the Erie & Pacific Dispatch, and the National Steamship Company to those of the Great Western Dispatch Company. But the undertakings of the respective carriers, although contained in a single instrument, were distinct and several and not joint. The bills of lading of the Erie & Pacific Dispatch declared

that its contract was executed and accomplished, and that its liability as common carrier should terminate on the delivery of the property to the Oceanic Steam Navigation Company, at the White Star Wharf, Jersey City, when the liability of the steamship company should commence and not before."

Again, at page 420, he says:

"The claim that there was an unreasonable detention of the cotton by the defendant after arrival and a failure of prompt delivery is not supported by the evidence. The general duty of an intermediate carrier of property involves the obligation on his part to deliver the property at the end of his route to the succeeding carrier within a reasonable time after its arrival (*Rawson vs. Holland*, 59 N. Y., 618). The cotton in question was accompanied by way-bills. The way-bills of the Erie & Pacific Dispatch contained the words, 'Consigned to Liverpool, England, care of Samuel Debow, New York.' Debow was the president and manager of the Erie & Pacific Dispatch. In like manner the way-bills of the Great Western Dispatch Company consigned the property to the care of its agent in New York. The uniform course of business between the defendant and the dispatch companies had been for the defendant, on arrival of property carried under bills of lading, to give notice to the proper agent named in the way-bill of such arrival. It then became the duty of the intermediate consignee or agent to obtain a permit from the steamship company for the delivery of the property to the steamship, and deliver the permit to the defendant; and, on such permit being obtained, it was the duty of the defendant's agent to deliver the property on lighters to the proper vessel. On arrival of the cotton in question, prompt notice was given by the defendant, in accordance with the custom. But, by reason either of the neglect of the agents of the dispatch companies to obtain the proper permits or the inability of the steamship companies to receive the property, the defendant was unable to get rid of the cotton, although its agents were persistently urging the agents of the dispatch companies to obtain the proper permits for its removal. *Upon these facts we are of opinion that the defendant fully discharges its duty, and is not chargeable with any negligence in respect to the detention of the cotton.* By the course of

business, the agents of the dispatch companies assumed the duty of obtaining the proper permits and the cotton, being consigned to their care, the defendant was justified in acting under their directions, and in accordance with the course of business they had established. The defendant made no express contract with the plaintiff to deliver alongside the vessel. Its immediate principals were the dispatch companies and it fully discharged its duty when it gave prompt notice of arrival and requested the agent to obtain the proper permits and held itself in readiness to deliver the cotton as soon as the permits were obtained. Assuming that there was an unreasonable detention of the cotton at the freight house of the defendant, it was not its fault and did not deprive the company of the benefit of the exemption in the bills of lading. The plaintiff must be deemed to have authorized the defendant to deal with the property according to the custom and under the direction of the dispatch companies, to whose care it was consigned at New York (see *Van Santvoord vs. St. John*, 6 Hili, 157 ; *Mills vs. The Michigan Central R. R. Co.*, 45 N. Y., 626).

In Railroad Co. vs. Manufacturing Co., 16 Wall., 318, it is very clearly intimated in the opinion of Mr. Justice DAVIS that the liability of the initial carrier is not in all cases and under all circumstances an absolute liability as such carrier, regardless of what the succeeding carrier may do, bus that its liability as carrier may be modified by circumstances, and if it has duly transported property and has made reasonable efforts in the way of tender to forward the property, its relation to the property must subsequently thereto be judged as that of warehouseman rather than that of carrier. This was a case of carriage over the Michigan Central Railroad destined for Stafford, Conn. ; the goods were carried to Detroit and while being held in the station at Detroit for a period of six days, were destroyed by an accidental fire. *There had been no attempt to deliver to the connecting carrier at Detroit,*

there being at the time a large accumulation of freight at Detroit awaiting propellers upon the lakes. Justice DAVIS says (p. 324) respecting the duty of the carrier :

" Different views have been entertained by different jurists of what the carrier is required to do when the transit is ended in order to terminate his liability, but there is not this difference of opinion in relation to the rule which is applicable while the property is in process of transportation from the place of its receipt to the place of its destination.

" In such cases it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line and to deliver to the next carrier in the route beyond. This rule of liability is adopted generally by the courts in this country, although in England, at the present time, and in some of the States of the Union, the disposition is to treat the obligation of the carrier who first receives the goods as continuing throughout the entire route. It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country, but the rule that holds the carrier only liable to the extent of his own route and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction. *Public polity, however, requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route, without delivery or an attempt to deliver to the connecting carrier.* If there be a necessity for storage it will be considered a mere accessory to the transportation, and not as changing the nature of the bailment. *It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by any act indicating an intention to renounce the obligation of a carrier, will not change or modify even his liability. It may be that circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them,* but if he had reasonable grounds to anticipate the occurrence of these adverse circumstances when he received the goods, he cannot, by storing them, change his relation towards them.

" Testing the case in hand by these well-settled principles, it is apparent that the plaintiffs in error are

not relieved of their proper responsibility, unless through the provisions of their charter or by the terms of the receipt which was given when they received the wool. *They neither delivered nor offered to deliver the wool to the propeller company.* Nor did they do any act manifesting an intention to divest themselves of the character of carrier and assume that of forwarder."

Most of the cases cited in the books on the liability of connecting carriers are of this character, where the lodging in the warehouse or the terminus is a mere incident of the carriage, or it has been done without any notice to the next succeeding carrier or anything in the nature of a tender of the goods to such carrier. Such are the cases of Dispatch Co. vs. Kahn, 76 Ill., 520; Goold vs. Chapin, 20 N. Y., 266; McDonald vs. Western Railroad Company, 34 N. Y., 497; Ill. Centl. R. R. Co. vs. Mitchell, 68 Ill., 471; Mills vs. Mich. Centl. R. R. Co., 45 N. Y.; Ladue vs. Griffith, 25 N. Y., 364.

In McHenry vs. Railroad Co. (4 Herrington, Del., 448), the duty of a connecting carrier is thus stated by BOOTH, Ch. J.:

"But where he receives goods to be carried by him from one place to another, which is at the terminus of his route, thence to be forwarded by a distinct conveyance to another place, it is his duty, as soon as he arrives at the place to which he engaged to carry the goods, to deliver them to the carrier (if there to receive them) by whom they are to be conveyed to their place of final destination. If such carrier be not present or there be no agent to receive the goods, it is the duty of the former carrier to deposit them in a warehouse for the purpose of being forwarded. When he has done so he discharges himself from the custody of the goods as a common carrier and becomes in regard to them a mere warehouseman (Garside vs. Trent and Mersey Navigation Co., 4th Term, Rep., 581; *in re* Webb *et al*, 4 Taunt., 433; 4 Com. Law Rep., 159).

In Garside vs. Proprietors of the Trent and Mersey

Navigation Co. (4 Term Reports, 581), the declaration charged the defendants as common carriers for hire from Stourport to Manchester, and that the plaintiff delivered to the defendants four packages of hops to be carried from Stourport to Manchester, to be forwarded from thence to Stockport; that the defendant undertook this for certain hire and reward, and yet that the defendant did not forward the hops from Manchester to Stockport. At the trial it appeared that the goods directed to the plaintiff at Stockport were delivered to the defendants to be carried from Stourport to Manchester; that they arrived safely at Manchester on the 30th of September and were put into the defendant's warehouse, where that night, together with other goods, they were burned in an accidental fire before any carrier came from Stockport to whom they could be delivered. The course of business was when goods were sent from Stourport to go beyond Manchester, if any carrier was there, to receive them upon payment of carriage from Stourport to Manchester; if not the defendants put them in their warehouse till a carrier arrived to whom they could be delivered. The verdict was taken for the defendant, with liberty to the plaintiff to move to set it aside and enter up a verdict for him if the Court should be of the opinion that the defendants were answerable. The Court refused even a rule to show cause. Lord KENYON, Ch. J., said:

"If the defendants were considered merely as warehousemen, there would be no pretense to say that they were liable for such an accident as the present. The case of a carrier stands by itself upon peculiar grounds; he is held responsible as an insurer; and the reason given in the books (whether well or ill-founded is immaterial) is to prevent fraud. But I do not see how we can couple the character of the carrier with that of the warehouseman, in which case

the defendants are not liable here, they not having been guilty of laches."

BULLER, J., also observes :

" The keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods ; for when the voyage to Manchester is performed, it is the interest of the carrier to get rid of them directly ; and it was only because there was no person ready at Manchester to receive these goods that the defendants were obliged to keep them.

" Rule refused."

The rule is thus stated in Hutchinson on Carriers, Sec. 102*a*, 2d Ed. :

Duty of first carrier to effect delivery to succeeding carrier :

It is the duty of the first of two connecting carriers upon the arrival of the goods at the point of connection with the succeeding carrier, if he knows where and to whom they are to be delivered, to use reasonable diligence to deliver the goods to the succeeding carrier, and at all events to make a tender of delivery and to stand ready to deliver them in accordance with the tender.

Regan vs. Railway Co., 61 N. H., 579.
McKay vs. Railroad Co., 50 Hun., 563.
Insurance Co. vs. Railroad Co., 8 Baxt., 268.
Whitworth vs. Railroad Co., 87 N. Y., 413.
Rawson vs. Holland, 59 N. Y., 611.
Burroughs vs. Railroad Co., 100 Mass., 26.
Dunham vs. Railroad Co., 70 Me., 164.

Snow vs. Railway Co., 109 Ind., 422.

In Regan vs. The Railway Co., 61 N. H., 579, perishable goods had been shipped by defendant's railway to its terminus at Portland, whence they were to be shipped by boat to Boston. The goods reached Portland in due course on Saturday after the boat had gone. No boat ran on Sunday. On Monday the boat agent notified defendant's agent that on account of a

severe storm raging no boat would run that day, and that he did not know when it would run again, as it looked like a long storm. Defendant's agent, therefore, sent the goods on that day to Boston by railroad, but did not notify the consignee of the change. The train got off the track owing to the storm, and was delayed, so that when the goods reached Boston they were damaged. Said the Court:

"The defendant's undertaking was to carry the plaintiff's goods from Groveton to Portland and deliver them to the boat for transportation to the consignee at Boston. When they had carried the goods to the terminus of their line in Portland and had notified the agent of the boat line that they were ready to deliver the goods for further conveyance, they had done all that was required by the terms of their contract; and if the ordinary running of the boat had not been interrupted, they would have been relieved from further liability. *Gray vs. Jackson*, 51 N. H., 9; *Ins. Co. vs. Railroad*, 104 U. S., 146. By an unforseen event for which the defendants were not responsible, it was impossible to forward the goods by the conveyance specified. The failure of the boat to run as usual did not impose upon them the duty of transporting the goods from Portland to Boston. That duty they had never assumed and no change of circumstances could subject them to the extraordinary responsibility of carriers beyond the termination of their route. But, although they owed no duty of further transportation, the defendants were bound to the exercise of reasonable care and to so conduct in relation to the plaintiff's goods that he should suffer no unnecessary loss or damage. *Though no longer liable as common carriers, they were liable as depositaries and required to exercise ordinary care in the custody of the goods.* In cases of accident or emergency it sometimes happens, although the transit is at an end, that the duty is cast on the carrier of taking such reasonable care of the goods as a reasonable owner would take of his own goods. *Railway Co. vs. Swaffield*, L. R., 9 Ex., 132. And a carrier is bound to use all reasonable means such as a prudent owner being present would take to save the property from loss by natural causes. *Ed-*

wards Bail., sec. 598; *Peck vs. Weeks*, 34 Conn., 145; *American Express Co. vs. Smith*, 33 Ohio St., 511; *S. C.*, 31 Am. Rep., 561, and notes, 567; *Empire Transportation Co. vs. Wallace*, 68 Pa. St., 302; *N. & C. R. R. Co. vs. David*, 6 Heisk, 261. What constitutes such reasonable care and diligence is a question of fact to be determined with reference to all circumstances of the case. *Cass vs. B. & L. R. R.*, 14 Allen, 448, 450. The defendant's agent, learning that the boat would be prevented from running on account of the storm, and knowing the perishable character of the goods, forwarded them the same afternoon by the Eastern Railroad; and the Referee finds that in so doing he exercised due care and prudence, but that he was negligent in not notifying the consignee of the change of route. He also finds that such notice would not have avoided the loss and that the plaintiff suffered no injury by reason of the negligence of defendants' agent. Upon these facts the plaintiff's action cannot be maintained. After the termination of the defendants' liability as common carrier, they were answerable only for the injuries happening in consequence of their own negligence. They were not responsible for loss which they could not have prevented by the exercise of due care. Sh. & Red. Neg., Sec. 8."

In Wheeler on the Modern Law of Carriers, p. 282, the following is a statement of the law:

"It does not fall within the scope of this work to consider in detail the law as to when the liability of the first carrier ceases nor when he is liable for injuries occurring on the connecting line.

"In general, it may be said that, in order to discharge himself, he must make such a delivery to a connecting line as he should make if the place of consignment was on his own route, and when he has made such delivery his liability ceases. If he notify the next connecting carrier that he is ready to deliver the goods to him, and the latter, after a reasonable time, neglects to receive and to remove the goods from the custody of the first carrier, they may then be warehoused, and the liability of the first carrier as such will thereupon cease, and he will be liable as warehouseman only."

Citing

In Re Peterson, 21 Fed. Rep., 885.

Eaton vs. Newmark, 33 Fed. Rep., 891.
Reed vs. U. S. Ex. Co., 48 N. Y., 462.
Mills vs. Mich. Cent. R. R., 45 N. Y., 622.
Dunson vs. N. Y. Cent. R. R., 3 Lans. (N. Y.), 265.
Wahl vs. Holt, 26 Wisconsin, 703.
Mobile & Ohio R. R. Co. vs. Hopkins, 41 Ala., 486.
Lewis vs. Western R. R., 11 Metcalf (Mass.), 509.
Louisville & N. R. R. vs. Campbell, 7 Heisk. (Tenn.), 253.

In John B. Ayres vs. Western Railroad Corporation, 14 Blatch., 9, goods in course of transportation from West Springfield, Mass., to Cleveland, Ohio, were destroyed by fire in the depot of the Western Railroad Corporation at East Albany, New York. The receipt given at West Springfield recited that

"this contract and the responsibility of the parties hereto are limited and controlled by the rules and regulations printed upon the back of this receipt, it being also understood that this corporation assumes no liability beyond the end of its own line, and that so far as it acts as agent for other parties in the joint transit aforesaid, said parties are separately liable."

Upon the back of the receipt was also a condition that

"the company will not hold itself liable as common carrier for articles of freight after their arrival at the place of destination and unloading at the company's warehouse or depots."

Upon this clause the defendant relied for its defense to the action brought for the recovery of the value of the goods. The goods arrived at East Albany and were unloaded on the second of July, and on the fifth the warehouse took fire, and the goods were consumed

without fault on the part of the defendant. No notice of the arrival of the goods was given by the defendant, the Western Transportation Company, but it appeared that an agent of the latter, according to the usual course of business, had visited the warehouse of the defendant to look for goods prior to the 5th of July. Upon these facts WALLACE, J., says:

"Giving effect to the receipt delivered by the defendant as a special contract, which restricts the common law liability of the defendant as a carrier, and renders it liable only according to the conditions mentioned upon the face and back of the receipt, the defendant was liable as a carrier for the goods destroyed in its warehouse while in course of transportation. The goods were to be transported by the defendant to its depot for the purpose of delivery there to a second carrier in the course of transportation to the ultimate destination of the goods; and in such case the carrier is liable as a carrier while the goods are in his warehouse awaiting delivery to the second carrier, *unless it is absolved by notice after arrival to the second carrier* or by the terms of a special contract with the shipper."

Citing,

Condict vs. Grand Trunk Railway Co., 54 N. Y., 500.

Railroad Co. vs. Mfg. Co., 16 Wall., 318.

Mills vs. Mich. Cent. R. R. Co., 45 N. Y., 622.

McDonald vs. Western R. R. Corp., 34 N. Y., 497.

Rawson vs. Holland, 59 N. Y., 611.

In Wehmann vs. Minneapolis, St. P. & S. S. M. Ry. Co., 59 N. W. Rep., 546, was considered the case where flour was carried over defendant's line and at the end of the line was put in defendant's warehouse on the 21st of November, and remained there until November 29, when it was destroyed by fire. At the point where the warehouse was situated

(Gladstone), the line of the next carrier began, and there was no evidence on the trial that notice of the arrival of the flour at the terminus was given to the transportation company, or to the plaintiff. The Court, through GILFILLAN, C. J., after passing upon the question whether the liability of the defendant was to carry the goods the entire route, or simply over its own line, and then to deliver to a connecting carrier, says:

"*The liability of the defendant is to be determined as though its contract had been to carry to Gladstone and there deliver to any consignee.*

"There is no express evidence on the point but under the arrangement for a continuous line it is to be presumed that the transportation company had an agent at that point to whom the flour might have been delivered and to whom notice of its arrival might have been given, and that the defendant knew who that agent was. When the consignee resides at the place of destination or has an agent there authorized to receive the goods, and that is known to the carrier, the latter's liability as carrier does not end, and the liability become that of a warehouseman until the lapse after notice to such consignee or agent that the goods have arrived of a reasonable time to receive and remove them."

Effect of the words "in whose actual custody the cotton shall be" considered.

Upon the trial of the case the Court gave controlling force to the following language of the first paragraph of the bills of lading:

"In case of any loss, detriment or damage done to "or sustained by said cotton before its arrival and "delivery at its final destination, whereby any legal "liability is incurred by any carrier, that carrier alone "shall be held liable therefor in whose actual custody "the cotton shall be at the time of such damage, detri-"ment or loss" (Record, p. 88).

The Court of Appeals also in the concluding portion of the opinion seem to coincide in this view (Record, p. 117).

Under the first point of this brief respecting the delivery of this cotton, we have argued that the cotton involved in this suit had been actually delivered to the connecting carrier, the Elder, Dempster & Co. steamship line; that the wharf at Westwego was, to the extent necessary to carry out the provisions of contract 44 under which this cotton was shipped, the wharf of Elder, Dempster & Co., notwithstanding all other uses of the wharf, and the general control of it were in the defendant the Texas and Pacific Railway Co.

We think the authorities cited warrant the conclusion that, for the purposes of carriage, this cotton was, at the time of the fire, in the "actual custody" of Elder, Dempster & Co., and therefore the suggestions of the Court do not properly apply. But assuming for the purposes of this argument upon the question we are now considering, that the words of the bill of lading mean something more than was meant by "delivery" in the case of Pratt vs. Railway Company, or in the Connecticut cases of Converse and Merriam, or in the Smyser case from Illinois, and the Arkansas case, still the question remains if under the circumstances of this case the cotton was in the "actual custody" of the Texas and Pacific Railway Company, in what character did the Texas and Pacific Railway Company hold it? Was it as carrier, or was it as forwarding agent of the shipper, having discharged its primary duty of carrying to the end of its route, and then holding it for the purpose of forwarding as a warehouseman?

It may be observed that, even if the construction

of the words of the bill of lading which the Court adopted may be approved, still the conclusion at which the Court arrived in directing a verdict by no means necessarily, follows if the doctrines we are contending for under this head of our argument are correct. There are conditions in which, when the initial carrier has fully performed its part of the contract of carriage, it thereupon becomes relieved of the severe obligations of a carrier, and has substituted therefor the lighter obligations of a warehouseman. The authorities which have been cited justly the conclusion that upon the first carrier's performing his duty of carriage, and then tendering to the next carrier the goods, the utmost liability chargeable upon the first carrier thereafter is that of warehouseman. Therefore, although he may have the goods in his "*actual custody*," it does not follow that he thus holds them as a carrier if he has in fact complied with the conditions relieving himself of the responsibility of a carrier. (See Deming v. Norfolk & Western R. R. Co., cited *post*. p. 84).

Did not the defendant comply with these conditions in the case at bar? The fact is indisputable that it had completed the carriage, that it had carried this cotton to Westwego, unloaded it upon the wharf, the place agreed upon with the next carrier for its reception, and had given notice to the Elder, Dempster & Co. line of steamships of its presence there in a condition to be removed at the pleasure of Elder, Dempster & Company; that this was all that it could do in the way of shipment, and performance of its own contract of carriage; that it was then absolutely helpless without the co-operation of the steamship company to forward that cotton upon the route and lines which had been selected by the shipper, to wit—from Bonham to New Orleans by the Texas and Pacific Railway Company,

and from New Orleans to Liverpool by the Elder, Dempster & Co. line of steamships.

This being so, does it not follow that the Texas and Pacific Railway Company must be deemed in this matter to have held only the relations of warehouseman to this cotton, although it was in its actual custody, and that it held the cotton only as warehouseman notwithstanding it was upon its wharf, unless the iron-clad rule is to be established that a carrier taking goods for shipment beyond its own lines, and undertaking to carry only upon its own lines remains liable as carrier until the succeeding carrier, selected by the shipper, and which has contracted to carry them forward upon arrival, sees fit to receive them from it, or until, at its own risk and expense, it ships them by another carrier?

Inequity of Result of Decision.

The effect of the rule established by the Courts below in this case is unjust in the extreme. Look at the exact facts of the case. The defendant agreed with the shipper to carry his cotton to Westwego and then turn the cotton over to Elder Dempster & Co. Elder Dempster & Co. also agreed with the shipper to take the cotton at Westwego and carry it to Liverpool. These contracts were several and not in any sense joint. The defendant complies with its contract, so far as it can, carries the cotton, and the steamship company defaults upon its independent engagement. For such default, for which the defendant is no wise responsible, the defendant must account to the shipper. This is making the defendant the guarantor of Elder Dempster & Co. in reality, something certainly never contemplated in the bill of lading.

Effect of the Clause "Liberty to Ship by Another Steamship or Steamship Line."

It is of no importance that the bill of lading contains the clause "with liberty to ship by any other steamship or steamship line." This phrase was relied upon by the Court below to support the view that it was not in contemplation of the parties that the railroad company could relieve itself of its obligations as a common carrier when the goods had arrived at the end of its route, merely by giving notice to the succeeding carrier and without notifying the shipper. The Court said: "The very contingency of the failure, or neglect or refusal of the second carrier to accept the goods of the first carrier is provided for, because it is left optional *with the first carrier* to send them forward by any other steamship line than the Elder Dempster Steamship Company" (Record, p. 89). In this, as it seems to us, the learned Judge was clearly in error and overlooked the form of the contract of shipment. His language implies that it was the duty *of the railroad company*, if it wished to protect itself, to forward the goods by some other steamship line, and ignores the obligation, which was imposed upon the steamship company by the contract between it and the shipper contained in the Bill of Lading to receive the cotton upon its arrival at Westwego, and carry it from that point to Liverpool.

The bill of lading was not, as the Court assumed, a mere contract between the shipper and the railroad company. As we have already pointed out, it was two

separate contracts in one instrument, being on behalf of the steamship company, as well as on behalf of the railroad company. The shipper agreed that his goods were to go "from Bonham, Texas, to Liverpool, Eng-" land. Route: via New Orleans and Elder Demp-" ster Steamship Line." The agreement being on behalf of the steamship company and the railway company severally, and the steamship company as well as the railroad company had rights and obligations under it. It cannot, therefore, be said that in the event of the failure of the Elder Dempster line to receive the goods promptly the duty of providing other means of ocean transportation was thereby imposed upon the railroad company. This would make the contract what the Court in directing a verdict said it was not; a contract in which the railway company, defendants, was responsible for the carriage the entire distance from Bonham, Texas, to Liverpool, England. The clause was evidently inserted for the purpose of protecting, not the railroad, but the steamship company, against such a contingency as arose in the case of Marx against the National Steamship Company (22 Federal Reporter, 680).

Suppose in this case the cotton had been actually loaded by the Elder Dempster Company's line upon one of its own steamers, but thereafter it had been found impossible for some reason to continue the voyage to Liverpool, and the steamer had, either in the port of New Orleans or elsewhere, transferred its cargo to another vessel. It could hardly be doubted that in a suit to recover damages for the loss of the cotton upon such vessel, the Elder Dempster Company would have been able to avail itself, in defense, of the above-quoted clause, whereby the shipper agrees that

any other steamship, or steamship line, may be substituted between New Orleans and Liverpool. If, therefore, the steamship company has rights under the contract, it must have correlative duties. The duty of providing other means of transportation between Westwego and Liverpool under the contract for the cotton involved in this suit rested upon the steamship company. It did not rest upon the railroad company to ship by any other line of steamers. The shipper had contracted with the Elder Dempster & Co. line to carry his cotton from New Orleans to Liverpool, and had given them the privilege of performing their contract with him by other ships or steamship lines. The defendant's duty was performed when the cotton was carried by it to the end of its own line and then turned over to next carrier, either Elder Dempster & Co., or a substitute for it. The shipper therefore cannot say that it was the duty of the railroad company to provide means of ocean transportation, and when the proof shows that the railroad company has done all that was in its power to do as a common carrier with regard to the cotton, he cannot insist that the company shall be held to the full measure of a common carrier's liability while it was, as a matter of fact, only holding the cotton as warehouseman to await the convenience of the second carrier, also a party to the contract.

The Authorities Further Considered.

In Wood vs. Milwaukee & St. Paul Railway Co. (27 Wis., 541) the plaintiff shipped from Boston and New York 41 packages of merchandise consigned to himself at Winona, Minn. At Watertown in Wisconsin the

packages were delivered to the defendant, 35 of them on the 12th of May, 1870, and the remaining six packages on the following day, for transportation to La Crosse, which was the western terminus of defendant's line of railway. They were transported by the defendant to La Crosse, the 35 packages reaching there on the morning of May 13th, and the other six packages on the following morning. The custom of the defendant was to forward from La Crosse all goods consigned to Winona by the steamboat "Keokuk," which was a common carrier on the Mississippi River. The "Keokuk" made daily trips from La Crosse to Winona, usually leaving La Crosse at 8 A. M. and returning about 7.30 P. M. On her return she was accustomed to receive from the defendant all freight from Winona, which was ready for shipment, sometimes taking it on board in the evening, sometimes not until the following morning.

Between the railroad track and the river at La Crosse there were certain warehouses owned and controlled by the defendant from which goods were shipped on board the "Keokuk" and other steamers, and in which goods were received from such steamers. All goods received into these warehouses were distributed to different portions of them according to their destination; a portion of each warehouse was devoted to freight consigned to Winona. Soon after the arrival of plaintiff's goods at La Crosse and on the same day, they were taken from the cars, and placed in one of the warehouses in the part set apart for Winona freight.

The course of business at La Crosse between the defendant and the Packet Company in respect to the shipment of goods arriving by the defend-

ant's railroad was as follows: Upon the arrival of such freight the waybills accompanying the same were copied in a given freight book of the defendant, and entered by the yard matter in the train book. The freight was then checked into the warehouse of the defendant, and distributed to its appropriate place therein according to its destination. The bills of lading for the consignees were then made out from such waybills, and from these bills of lading two tally books were made, one for the check clerk of the defendant and the other for the steamboat which called for the goods; then the freight was ready to be delivered to the steamboat. This was all done by the employees and agents of the defendant. The goods were then taken from the warehouse by the employees of the packet company and placed on the boat, the second clerk of the boat, and the check clerk of the defendant attending with the tally books to verify the correctness of the shipment. After the freight was on board, the clerk of the boat signed a page of the manifest book, which had been made by copying into it the bills of lading of the goods shipped. After the freight was deposited in its appropriate place in the warehouse, it was handled entirely by the crew of the steamboat. It was not the custom for the defendant to give actual notice to the Packet Company of the arrival of freight at La Crosse for those points on the river, but the boats called at the warehouse of the defendant for such freight on their regular trips, taking all that was ready for shipment.

The goods of the plaintiff were not ready for delivery on board the "Keokuk" when she left for Winona on Saturday, May 14, because the bills of lading and manifest had not yet been made. They

were completed, however, when the boat returned that evening as to thirty-five packages, but the remaining six packages were never manifested. The "Keokuk" returned to La Crosse at the usual time Saturday evening, unloaded her down freight, and, after doing some towing, laid up at a wharf near another steamboat—the "War Eagle"—which was taking freight from the warehouse in which plaintiff's goods were stored. While the two remained in this position, and about one o'clock on the morning of Sunday, May 15, the "War Eagle" took fire; the flames communicated to the warehouse, and all its contents, including the goods of the plaintiff, were consumed.

The plaintiff brought suit for the value of the goods, and, upon the trial of the case, the trial Court adopted the position that there was no suspension of the liability of the defendant as common carrier until the goods were actually delivered to the Packet Company, and that, inasmuch as they were destroyed before such actual delivery, the defendant was liable to the plaintiff for their value. This position was overruled by the Supreme Court, and the position adopted that the liability of the railway company was that of warehousemen; that, as between connecting carriers, the first carrier holds for delivery to the next carrier under the same terms as to a consignee at the end of the route. Upon this point LYON, J. (p. 551), says:

"The liability of a carrier for goods after they have reached their destination and are waiting delivery to the owner or consignee has been adjudicated by this Court in Wood vs. Crocker (18 Wis., 344). It is held in that case that where goods are transported by a railroad company to the place of consignment, and there deposited in its warehouse, the liability of such company as a common carrier in respect to such goods does not thereby cease, but continues until the same

are ready for delivery to the owner or consignee thereof, and until he has had a reasonable opportunity to take them away.

"There is doubtless much conflict of authority on this subject, but the rule there adopted was thought by the Court to be sustained by the sounder reason and to accord best with well-settled principles of public policy. We are not disposed to disturb that rule, and it is entirely unnecessary to refer to the authorities which hold a different doctrine.

"I think that the same rule should be applied here. I can see no difference in principle between a case where the transit is ended, and the carrier holds the goods for delivery to the owner or consignee, and one where the carrier conveys the goods over a portion only of the route and holds them for delivery to some connecting carrier. For the purpose of receiving such delivery I think the connecting carrier must be held to be the agent of the owner (*Schneider vs. Evans*, 25 Wis., 241). I find no adjudicated case which makes any such distinction, although in *McDonald vs. Western Railroad Corporation*, 34 N. Y., 497, Mr. Justice HUNT does say that there is an important difference. This is a mere passing remark, however, no explanation of the grounds of difference being stated and no authority cited in support of the proposition. Besides, the question as to whether any such difference existed was of very small significance in that particular case. It is true the defendant in that case was held liable as a common carrier, but had this been ruled otherwise the carrier was evidently guilty of gross negligence in not forwarding the goods in due time, and would doubtless have been liable as a forwarder for the value of the lost goods. The cases cited by counsel for the plaintiff to show that the liability of the carrier as such does not cease until the actual delivery of the goods to the next carrier fail, I think, to establish that proposition.

"*McDonald vs. Western Railroad Corporation*, *supra*, and *Goold vs. Chapin*, 20 N. Y., 259, assert the opposite doctrine. See opinions of SMITH, J., in the former case (p. 502), and of STRONG, J., in the latter case (p. 267).

"In *Miller vs. Steam Navigation Co.*, 10 N. Y., 431, and in *Hooper vs. Chicago & N. W. R. R. Co.* [*ante*, p. 81], and also in *Goold vs. Chapen*, *supra*, it was held that the transit was not ended. In *Blossom vs. Griffin*, 13 N. Y., 569, and in *Ladue vs. Griffith*, 25 N. Y., 364,

the goods had been delivered to the carrier for transportation and were destroyed before the transit commenced."

It was in the overruling of this case that Justice DIXON made the observations quoted from *Conkey vs. Railway Company*, 31 Wis., and which appear *ante* page 53, and in which, as a substitute for the rule announced in the Wood case, he would treat the goods as having been delivered to the second carrier.

In Deming vs. Norfolk and Western R. R. Co., decided by Judge BUTLER, U. S. Circuit Court, Eastern District of Pennsylvania, Vol. 16, Am. and Eng. R. R. Cases, p. 234, we have a case very similar to the case at bar. The Norfolk and Western R. R. Co., the defendant, owned a railroad from Bristol, Tenn., to Norfolk, Va., connecting at Bristol with the East Tennessee, Virginia and Georgia Railroad, and at Roanoke, midway along its own line, with the Shenandoah Valley Railroad, which connected at Hagarstown with the Pennsylvania Railroad system. These various companies had contract arrangements for the conduct of through business. In October, 1883, the plaintiffs Deming & Co., cotton buyers at Memphis shipped at that point two lots of cotton destined for Woonsocket, Rhode Island; and on October, 11th another lot of 100 bales. The shipment was made upon the Memphis and Charleston Railroad and through bills of landing were given. The first clause of the bill of lading is:

"Received of A. B. the following packages marked, &c., to be transported by the Memphis and Charleston Railroad and connecting railway and steamship lines, to order, at Woonsocket, R. I., upon the following conditions:"

The eighth paragraph of the bill of lading is as follows:

"It is further stipulated and agreed that in case of any loss, detriment or damage done to or sustained by any of the property here receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred by the terms of this contract, that company alone shall be held answerable *therefor in whose actual custody* the same may be at the time of the happening of said loss, detriment or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

The route over which the cotton was to be carried, as understood by the plaintiffs, was by the Memphis and Charleston road to Chattanooga; then by the East Tennessee, Virginia and Georgia Railroad to Bristol; then by the Norfolk and Western to Norfolk; then by the steamers of the Merchants' and Miners' Steamship Co. to Providence. The Merchants' and Miners' Transportation or Steamship Co. was running two lines from Norfolk, one to Boston and one to Providence. There were other lines running from Norfolk to Providence at the time of this shipment.

Upon the 15th of October the Merchants' Transportation Co. was unable to accept 500 bales of cotton until the next day on account of the accumulation of freight which had gradually grown from early in the month. Between the 15th and 23d of October there had been communication between the officers of the railroad company and the steamship company in reference to increased facilities for forwarding freight that was in transit. Other steamers were promised, but they did not come, although an extra steamer was expected in a few days on the 23d of October; and when the first shipment of this lot of cotton arrived at

Norfolk about 12,000 bales of cotton had accumulated on the wharves and in the warehouses of the steamship company. On the 23d of October the agent of the railroad company tendered delivery of the cotton in due course to the steamship company but no more could be conveniently stored upon the wharf of the steamship company, and the agent of the steamship company declined to accept the cotton, upon the ground that he had no place to store it, but proposed that, if the railroad company would unload and store in its own warehouse and on its wharf about 2,000 bales of cotton, he would pay for insurance upon it, and send a steamer in a few days to remove it. This wharf is the regular terminus of the railroad of defendant in the City of Norfolk and accessible equally with that of the steamship company to steamers. In reliance upon the assurance from the officers of the steamship company that an additional steamer would be sent to remove the cotton within a few days, and in view of the actually existing impossibility of its receipt by the Transportation Co., the superintendent of the railroad company authorized the Norfolk agent to unload the cotton and effect insurance upon it in the name of the Norfolk and Western Railroad Co. for account "of whom it may concern." On October 26, a thousand additional bales were received and unloaded upon the railroad company's wharf under the same arrangement; and between October 22d and 31st there arrived in all 3,028 bales, all of which were stored on the railroad company's wharf.

On the morning of the 14th of November a fire occurred and destroyed the larger part of the cotton stored on the railroad company's wharf. None of the loose cotton saved could be identified, and it was sold

under the direction of the fire underwriters, and the proceeds deposited for the benefit of whom it might concern.

It will be observed that the cotton in this case was in the "actual custody" of the defendant railway company, under an arrangement with the connecting steamship company by which the railway company "acquiesced in the delay" in delivery of the cotton to the steamship line.

Upon these facts, Judge BUTLER, after defining the defendant's obligations as an intermediate common carrier, which were for the safe carriage over its own line and delivery or tender to the next carrier beyond within a reasonable time, under all the exemptions allowed by the shipper and according to the terms of the bill of lading says:

"Such being the defendant's obligations, did it discharge them? It carried the merchandise safely and expeditiously to Norfolk. When the first consignment arrived on the 23d of October, it was tendered to the Merchants' & Miners' Steamship Co., and was refused on account of accumulation of freight on its wharves, with the request or proposal, however, to place it and subsequent consignments on the wharf and in the warehouse of the defendant (a place as convenient for loading into the steamboat company's vessels as on its own wharf), and with the assurance that vessels would speedily be provided and sent there for it. *This request was complied with under a reasonable expectation that the steamship company would load and forward the cotton without unreasonable delay. Placing the subsequent consignments as proposed was a substantial tender. The designation of this place for loading was a virtual designation of the place for tender.*

"To hold that the defendant should have hauled the cotton which arrived on the 26th to the steamship company's wharves in view of what had occurred would be unreasonable and unjust. The fact that insurance was procured is unimportant. Should the defendant have done more?

In view of the facts, it was not required to forward by any other route, nor would it have been justified in doing so. The steamship company was the carrier contemplated by the plaintiff. Indeed, it must be regarded as having been designated by him. If not on shipment at Memphis, it certainly was on delivery to the defendant. Those so delivering represented the plaintiff. That a preceding carrier represents the shipper in forwarding by his successor on a through line (under ordinary circumstances) is settled. The plaintiff's insurance would have been revoked by the substitution of any other route. Besides this, as already stated, the defendant was fully justified in believing that the merchandise would be accepted and carried within a reasonable time by the steamship company and would reach its destination more expeditiously by this route than any other. But for unforeseen circumstances which could not be anticipated, this expectation would have been realized. Furthermore, it can hardly be said that there was any other practically available route. The defendant was not, therefore, in fault.

Under the authority of these cases, therefore, we contend that if the words "actual custody" in the bill of lading are to have any special significance attached to them, while they may be controlling as to the particular carrier which may be liable as between the defendant and the steamship line, yet that they do not in any way import any significance as to the test of liability of the one which is liable. The nature of the liability is left to be determined by the facts and the principles of law applicable thereto in view of all the circumstances of the case. Under the circumstances of this case we insist that if the defendant is the one to whom these words affix whatever liability there is for the cotton destroyed upon the wharf at Westwego, on the 12th of November, 1894, the test of the defendant's liability under the facts shown here is not that of a common carrier but of a warehouseman, and that the

Court was therefore wrong in directing a verdict for the plaintiff.

III.

The judgment rendered and order of affirmance should be reversed.

Respectfully,
RUSH TAGGART,
Atty. for Texas and Pacific Railway Company.

RUSH TAGGART,
ARTHUR H. MASTEN,
Of Counsel.

No. 222.

Brief of Cleveland for D. C

Filed Jan. 26, 1899.

Supreme Court of the United States.

OCTOBER TERM,
No. 222.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

JOHN HENRY CLAYTON ET AL.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

TREADWELL CLEVELAND,
Counsel for Defendants in Error.

Supreme Court of the United States.

THE TEXAS AND PACIFIC RAILWAY COMPANY, *Plaintiff in Error,* *vs.* JOHN HENRY CLAYTON, NICHOLAS ROBERTS and CHARLES ANDERSON EARLE, *Defendants in Error.*	October Term, 1898. No. 222.

In error to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF IN BEHALF OF DEFENDANTS IN ERROR.

Statement.

This action is one of many brought by different shippers against the Texas and Pacific Railway Company to recover the value of cotton delivered to the said railway company as a common carrier, and destroyed while in its possession by the burning of the wharves of the said company at Westwego, La., a point on its line of road, on November 12, 1894.

This action concerns the destruction of only four hundred and sixty-seven bales of cotton. Over 22,000 bales in all were burned.

A plea was interposed on the ground that the Circuit Court had no jurisdiction, the defendant alleging that it was not a resident of the Southern Dis-

trict of New York. This plea was overruled on the authority of *Interstate Commerce Commission* vs. *Texas and Pacific Railway Company*, 20 U. S. Appeals, 1, and the question was finally determined by this Court in favor of the jurisdiction in *Texas and Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S., 197.

The testimony in the record relating to this question of jurisdiction may, therefore, be disregarded.

The statements of facts contained under various heads and in several places in the brief for the plaintiff in error require correction and supplement.

The four bills of lading upon which the action is brought make no mention of fire, and they are singularly free from clauses limiting the liability of the common carrier by rail. They contain, however, the following significant clauses, under which, when supplemented by the proof, the Circuit Court directed a verdict for the shippers and the Circuit Court of Appeals affirmed the judgment:

> "Received by the Texas & Pacific Railway * * * for delivery to shippers' order or their assigns at Liverpool, England, * * * from Bonham, Texas, to Liverpool, England. Route via New Orleans & Elder & Dempster Steamship line."
>
> * * * * * * *

"Upon the following terms and conditions, which are fully assented to and accepted by the owner:

> "That the liability of the Texas and Pacific Railway Company in respect to said cotton and under this contract is limited to its own line of railway, *and will cease, and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; and in case of any loss, detriment or damage done to or sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier*, THAT CARRIER ALONE SHALL BE HELD LIABLE THEREFOR IN WHOSE

ACTUAL CUSTODY THE COTTON SHALL BE AT THE TIME OF SUCH DAMAGE, DETRIMENT OR LOSS."

"*That the said cotton shall be transported from the port of New Orleans to the port of Liverpool, England, by the Elder, Dempster & Co. Steamship Line, with liberty to ship by any other steamship or steamship line; and upon delivery of said cotton to said ocean carrier at the aforesaid port this contract is accomplished, and thereupon and thereafter the said cotton shall be subject to all the terms and conditions expressed in the bills of lading and master's receipt in use by the steamship or steamship company,*" &c. (p, 91, 92).

It appears from the evidence that the line of the Texas and Pacific Railway Company terminates in the City of New Orleans, where it had warehouses and yards (pp. 31, 32).

Westwego, of which there is no mention in the contracts sued on, is in the Parish of Jefferson (p. 75), and is a branch terminal or station opposite to but not in either the city or the port of New Orleans. It consisted only of the Railroad terminal, a wharf with tracks, an office and sheds on it. The cotton involved in this suit was unloaded on the wharf at Westwego on various dates from October 22 to November 4, 1894, and was burned there on November 12, 1894.

Each of the bills of lading contains the following: "T. & P. Contract No. 44" (p. 92, &c.). There is no proof whatever that the shippers knew what this Contract No. 44 was. It is in fact a contract in writing between the Railway Company and the Elder Dempster Company, and is dated September 29, 1894. Its material particulars are:

> "Messrs. Elder Dempster & Company S.S. Line:
>
> "I have this day engaged 20,000 bales cotton for shipment by the Elder Dempster Company's S. S. line for Liverpool, England, at 49.21 per 100 pounds compressed cotton, delivery during months October, November and December, 1894, as per condition on the

reverse side of this contract. P. pro. Elder Dempster & Company, by M. & R. Warriner. Yours respectfully, C. G. Miller, Agent T. & P. Railway Co." (p. 46).

There are no conditions on the reverse side of the contract affecting any of the questions at issue herein.

There is no mention of Westwego in this contract, nor is there any testimony tending to show that the steamship company ever agreed with the railway company to send ships for the cotton to Westwego at any particular time during the months of October, November and December, 1894, or to receive at Westwego any particular lot of cotton at any definite time in those months or in any named vessel. Nor is there any testimony tending to show that the railway company considered that the steamship company was bound to send vessels for the cotton at any particular time or for any particular lot of cotton.

The conceded course of business between the carriers, of which however, the shipper had no knowledge, is substantially correctly stated in the brief for the appellants.

It must be noted however, that in none of the documents passing between the Railway Company and the Steamship Company is there any clause which is claimed by the appellant to show that the cotton was considered as delivered by the Railway Company to the Steamship Company. On the contrary, these papers clearly show that the Railway Company simply notified the Steamship Company that such cotton as was described in what are called the "transfers" was at the wharf consigned to the Steamship Company, and that the Steamship Company requested the Railway Company *to deliver* the described cotton to such and such a steamship on her arrival at the dock of the Railway Company.

It is a vital fact to be borne in mind throughout this controversy that the wharf of the Railway

Company was in no respect whatever under the control or management of the Steamship Company. The Railway Company employed the watchman clerks and the custodians of the dock (p. 78), and the statements which are to be found throughout the brief for the appellants, "that for purposes of shipment by Elder, Dempster & Company, the dock was in the control of their employees" or "that a part of the contract was the control of the dock by Elder, Dempster & Company, so far as the same was necessary for the loading upon their vessels," have no foundation whatever in the evidence. On the contrary, on page 38 of the appellant's brief there should be added the following to the cross-examination of Wilkinson:

> "I was the clerk in charge of the dock. I don't know whether I would have allowed a person to land unless he had permission of the Railway Company or not. It all depends on circumstances. He might explain what he was there for. He would have to explain what he was there for in order to get on the dock, and that explanation would have to be satisfactory to me" (Record, p. 78).

Miller, local freight agent, testified, page 33, in describing the persons who had charge of the dock at Westwego:

> "The persons who were immediately under me at Westwego at that time were Mr. A. L. Wilkinson, who was my chief clerk. * * * There were the Boylan watchmen, one by the name of Peake, one named Robau, and one named Schoen; there was a private watchman by the name of Schurb, either a private or Boylan watchman; a private watchman by the name of Valle. Those are not all, but all that I can recall at this time at Westwego, aside from the laborers (p. 33). * * * In November, 1895, the Railway Company had regularly employed at Westwego one day watchman, a private watchman, not far from the Boylan office, and one at night; the name of the day watchman employed at the time of the

> fire was Schurb. The name of the night watchman was Valle. The main man in charge of the clerical force at Weswego was Mr. Wilkinson. * * * The person in charge of the wharf for the Railway Company was the chief clerk, Mr. Wilkinson, so far as the party located permanently was concerned."

No person could come on the dock without the permission of the Railway Company. It was a private dock, and necessarily in control of its owner. The Railway Company conducted there a very large business, not only as to cotton, but as to other classes of goods brought there by its railroad to be delivered by it to many different steamship lines and ships. If any cotton or other goods had been stolen from the dock the loss would have fallen, not upon the Steamship Company, who had no employees there or any voice in the management of the dock, but would have been the loss of the Railway Company.

It must further be noted that there is nothing whatever in the contract, No. 44, which is the only contract which is made a part of the bill of lading, concerning Westwego.

Most of the testimony herein on behalf of the shippers and much on behalf of the Railway Company was taken in New Orleans prior to the trial. Upon the trial, however, Mr. Sargent was called by the Railway Company and testified (p. 83):

> "We offered him (Mr. Warriner) a certain figure for the transportation of twenty thousand bales of cotton, to be received by him at Westwego and delivered at Liverpool."

This was on the 27th of September.

Whatever such conversation was, the contract was reduced to writing on the 29th of September, and that contract makes no mention of Westwego, and the contract itself contains nothing in relation to

deliveries, with the exception that they should be made during October, November and December.

Mr. Pearsall was called on the trial, and stated (p. 81) an alleged conversation with Mr. Warriner, as having taken place on November 12, the day of the fire, in which he says:

> "They were requested to make every effort to move the cotton at the earliest possible moment and to comply with their contract. The exact words of their conversation I don't remember, but the sense of it was that their ships had met with great delays in New Orleans on account of the labor troubles they had, and at that time there was considerable trouble between the steamship agents and the cotton screw men; they were on a strike, the screw men, and they gave that as an excuse for not carrying out their contract of removing the cotton. That is about the sense of it, I don't remember the exact words."

This conversation, testified to when it is impossible to contradict it, does not in any way refer to any specific lot of cotton. The only contract which Elder, Dempster & Company had with the Railway Company, so far as the cotton in suit is concerned, is contract No. 44, and that contract, as we have seen, refers to deliveries during October, November and December. Whatever other contracts there may have been, if any, obliging Elder, Dempster & Company to remove any other cotton at any particular time does not appear, but it is strange that such a conversation could have taken place in view of the facts proved by Mr. Miller in relation to the loading of vessels at Westwego during the week prior to the fire.

This testimony shows conclusively (pp. 40-41) that there were only two cotton wharves or berths at the dock at Westwego, and that those cotton berths were each of them continuously occupied by other steamships loading cotton and other goods from the 5th to the 12th of November (p. 41). If Mr. Warriner did, in fact, make any excuse for not complying

with a contract, such conversation must have alluded to some other contract than contract No. 44.

There is no testimony whatever tending in any way to show that the railway company did not, as far as the cotton in this suit is concerned, acquiesce in any delay that might arise through the late arrival of vessels either at New Orleans or at Westwego, or that the Railway Company ever considered its part of the transportation terminated before the actual arrival of the steamship at Westwego, and the delivery to it through master's or mate's receipts then given, of the cotton designated for that particular vessel, or ever considered itself in any way a warehouseman, or that at any time the Railway Company considered that its duty was performed until after the arrival of the steamship at the dock at Westwego and the designation by the employees of the Railway Company of the cotton which the agents of the Steamship Company were then, and then only, for the first time ready to receive and care for. All the documents, as I have said, speak not of delivery made to the Steamship Company prior to the arrival of the steamship at the dock, but only of the readiness of the Railway Company to deliver to the steamship upon such arrival. The earliest moment when any employee of the Steamship Company was informed of the location of any lot of cotton on the wharf, was after the arrival at the dock of the vessel which was to take such cotton. The lots of cotton were then pointed out to the mate by the employees of the Railroad Company.

The fire took place before the arrival at the dock of any vessel which was to take this particular lot of cotton.

That the cotton in question was in the actual custody of the Railway Company at the time of its destruction must, it would seem, be conceded. It was on the dock owned exclusively by the Railway Company. That company's employees, and they only, cared for it, watched it, piled it and repiled it. It is

not even alleged that any of the cotton in suit was ever even seen by any of the employes of the Steamship Company.

There is no pretense of notification by the Railway Company to the Steamship Company that the latter was negligently delaying its receipt of this cotton, or that it was not performing its part of the agreement in respect to this cotton; in fact, no notice of the arrival at Westwego of any of the cotton in suit was ever sent to the Steamship Company until November 2, 1894, and no notice was ever sent of its arrival at New Orleans.

Although part of the cotton was unloaded as early as October 22, no notice whatever concerning it was sent by the Railway Company to the Steamship Company until November 2; some notices were sent as late as November 9, and for 100 bales no notice at all was sent.

At page 20 of the opposing brief it is stated that this cotton was, some time before the fire, in position ready to be taken by the Steamship Company from the place on the wharf where it had been unloaded. It does not appear from the evidence at what particular place on the dock this cotton was, and Mr. Miller has testified that when cotton was not in a position where it was accessible to the Steamship Company to take, it was the duty of the Railway Company to move it to a convenient place (p. 50), and cotton was constantly being moved, piled up closer and higher.

However much the Railway Company might have been inconvenienced by the arrival of so large a quantity of cotton at its terminal, the Steamship Company was under no contract obligation to take delivery except during the months of October, November and December. In addition to this, as we have seen, for the whole period between the notification of the arrival of this cotton in suit and the fire, all the dock room on the wharf at West Wego was occupied by vessels of the Elder, Dempster and other lines receiving cotton and other goods.

The legal questions to be determined upon this appeal are dependent upon the construction of written contracts and the force of uncontradicted testimony. They arise between the shipper and the initial common carrier and not between connecting carriers, and the essential facts are, as we have seen, few in number.

The following legal propositions are advanced by the appellant:

1. The cotton was actually delivered by the Railway Company to the Steamship Company.

2. If not actually delivered, it was constructively delivered by the Railway Company to the Steamship Company.

3. If not actually or constructively delivered to the Steamship Company by the Railway Company, the cotton was in the actual custody of the Steamship Company.

4. If not in the actual custody of the Steamship Company, but in the actual custody of the Railway Company, such custody by the Railway Company was not that of carrier but of warehouseman only, and no negligence being shown the shipper cannot recover.

First Point.

The Circuit Court properly denied the motion for a direction of a verdict in its favor made at the trial by the Railway Company, when the plaintiff rested.

The motion was made on the alleged ground that there was a failure of proof in two respects:

First.—That the complaint was wholly unproved in its entire *scope and meaning.* That there was

not a variance but an entire failure of proof of the cause of action alleged in the complaint.

SECOND.—That the allegations of the complaint were that bales of cotton were on or about the 12th day of November, 1894, wholly destroyed by fire at Westwego, Louisiana, at which time and place the same were in the possession of the Railway Company in the course of such carriage and as a common carrier; the answer admitting that the said cotton was destroyed at Westwego, Louisiana, aforesaid, denies each and every other allegation respecting the possession of said cotton; and that there was no proof of any of the allegations of the complaint in this regard (pp. 23, 24).

There was not an entire failure of proof. The complaint was proved in its entire scope and meaning.

The shippers, by the production of the bills of lading, proved that in the month of October, 1894, they delivered the cotton specified in the complaint to the Railway Company as a common carrier, and that it received the same and undertook and agreed, as a common carrier, to carry the same safely and securely from the place of shipment to Liverpool, England, by way of New Orleans, and thence to Liverpool, England, by the Elder, Dempster & Co. line of steamships, and there deliver the same to them. By these it appears that the Railway Company receipted for the cotton for delivery to shippers' order or assigns at Liverpool, England, and that the cotton was to be carried "From Bonham, Texas, to Liverpool, Eng. Route, via New Orleans and Elder & Dempster Steamship Line."

The contention of the Railway Company that the shippers having alleged a common law contract of carriage and proved one with certain restrictions or limitations, the complaint remained unproved "*in its entire scope and meaning*," is wholly with-

out foundation, as a reference to the following cases, if cases be needed, shows:

Dunn *vs.* Durant, 9 Daly, 389.
Catlin *vs.* Gunter, 11 N. Y., 373.
Place *vs.* Minster, 65 N. Y., 89.
Richards *vs.* Westcott, 2 Bosw., 589.
Bonsteel *vs.* Vanderbilt, 21 Barb., 26.

Second Point.

The Circuit Court below did not err in refusing to direct a verdict for the Railway Company at the conclusion of the testimony, on the ground that the testimony showed that there had been a delivery of the cotton sued for to the connecting carrier, the Elder, Dempster & Company line of steamers.

(1.) *There was no actual delivery of the cotton to the Elder, Dempster & Co. line of steamships.*

The cotton involved in the suit at bar was unloaded and notification of its arrival sent, as follows:

The 200 bales of cotton shipped on bill of lading No. 35 was unloaded at Westwego by the Railway Company between October 22d and 25th, 1894 (p. 107), but notice of its arrival was not sent to the steamship company till November 2, 1894 (p. 62).

The 100 bales of cotton shipped on bill of lading No. 29 was unloaded at Westwego on October 31, 1894 (p. 107), and notice of its arrival was sent November 2, 1894 (p. 62).

The 100 bales of cotton shipped on bill of lading No. 28 was unloaded on October 31, 1894, with the exception of 25 bales, which was unloaded on

November 4, 1894 (p. 107), and notice of its arrival was sent November 9, 1894 (p. 62).

It does not appear from the evidence that any notice was sent of the arrival of 100 bales of cotton shipped on bill of lading No. 61. That cotton arrived at Westwego on October 29, 1894, with the exception of 25 bales which arrived on November 2, 1894. It was unloaded on October 30th, 31st and November 1st and 4th, 1894 (p. 107).

It was the custom of the steamship company to return these so-called transfer slips to the railway company as soon as it was ready to take delivery, with the order to deliver to a specific steamship either at Westwego or about due there (p. 84).

These transfers did not indicate in any case where on the wharf at Westwego the particular lot of cotton there mentioned in fact was.

After the receipt from the steamship company of the so-called transfer slips with marks of lots of cotton on them, and after the arrival of the steamship at Westwego, if it were found necessary to get the cotton out, that is, to truck it from where it was originally stored on the wharf, out in front or near enough in front to enable the steamship people to get it without having to go around other piles of cotton, that work Mr. Miller says would be attended to by some of the employees at Westwego of the Railway Company. Such employees would locate and get it out (p. 50). It was understood that the Railway Company would get out cotton when necessary to do so (p. 50).

The receiving officer of the ship, after the cotton had been found and pointed out to him by the railway employees, counted the cotton and signed for it and delivered mate's receipts for it (p. 85). Mr. Miller admits that he does not know of any instance where a single bale of cotton was allowed to go aboard a steamship without a mate's receipt for it (p. 70).

For the purposes of this appeal it is not essential to consider whether the deposit of cotton at West-

wego, a place not within the port of New Orleans, and not mentioned in the bills of lading nor in contract No. 44, was or was not a violation of the contract of carriage. It is important, however, I venture to suggest, that this point should not be passed upon on this appeal, as it is directly involved in other pending suits brought by other shippers to recover loss suffered through this fire.

The argument contained in the brief for the appellants upon the question of the delivery of the cotton, is made without reference to the words in the bill of lading that that carrier alone should be liable for loss *in whose actual custody* the cotton was at the time of such loss. As was said by Judge Lacombe at Circuit, the word "delivery" has been the subject of very frequent contention; but the word "delivery" in these bills of lading must be construed in connection with the subsequent clause in relation to actual custody, and if there had been, as there was not, even a constructive change of the possession, and the cotton had remained as it did in the actual custody of the Railway Company, the Railway Company alone would have been liable by the plain terms of the contract.

The cases mainly relied upon by the Railway Company at the trial and in the court below and in this court in support of the claim of a delivery are *Pratt* vs. *Railway Company*, 95 U. S., 43, and two Connecticut cases cited in the Pratt case, viz., *Merriam* vs. *Hartford R. R. Co.*, 20 Conn., 354, and *Converse* vs. *N. & N. Y. Tr. Co.*, 33 Conn., 166.

No one of the cases cited under this head in the appellant's brief has any legal relevancy to the questions at issue here, for the reason that the facts are so entirely diverse, as appears by the statements of them contained in the appellant's brief.

In no one of these cases do the words "actual custody" appear in the contract sued on.

In the Pratt case the question was whether the

Grand Trunk Railway Company or the Michigan Central Railway Company was liable. The Court says:

"The Grand Trunk Railway Company is engaged as a common carrier of persons and property. This action seeks to recover damages for a violation of its duty in respect to certain merchandise shipped from Liverpool to St. Louis and carried over its road from Montreal to Detroit. The goods reached the City of Detroit on the 17th of October, 1865, and on the night of the 18th of the same month were destroyed by fire.

The defendant (the Grand Trunk Railway Company) claims to have made a complete delivery of the goods to the Michigan Central Railroad Company, a succeeding carrier, and thus to have discharged itself from liability before the occurrence of the fire. * * * The precise facts upon which the question here arises are as follows:

At the time the fire occurred the defendant had no freight room or depot at Detroit, except a single apartment in the freight depot of the Michigan Central Railroad Company. Said depot was a building several hundred feet in length and some three or four hundred feet in width, and was all under one roof.

It was divided into sections or apartments, without any partition wall between them. There was a railway track in the centre of the building, upon which cars were run into the building to be loaded with freight. The only use which the defendant had of said section was for the deposit of all goods and property which came over its road or was delivered for shipment over it. This section, in common with the rest of the building, was under the control and supervision of the Michigan Central Railroad Company, as hereinafter mentioned. The defendant employed in this section two men, who checked freight which came into it. All freight which came into the section was handled exclusively by the employees of the Michigan Central Railroad Company, for which, as well as for the use of said section, said defendant paid said company a fixed compensation per hundred-

weight. Goods which came into the section from defendant's road destined over the road of the Michigan Central Railroad Company, were at the time of unloading from defendant's cars, deposited by said employees of the Michigan Central Railroad Company in a certain place in said section, from which they were loaded into the cars of said latter company by said employees when they were ready to receive them; *and, after they were so placed, the defendant's employees did not further handle said goods.* Whenever the agent of the Michigan Central Railroad Company would see any goods deposited in the section of said freight building set apart for the use of the defendant, destined over the line of said Central Railroad, he would call upon the agent of the defendant in said freight building, and from a way-bill exhibited to him by said agent, he would take a list of said goods, and would then, also, for the first time, learn their ultimate place of destination, together with the amount of freight charges due thereon; that, from the information thus obtained from said way-bill in the hands of the defendant's agent, a way-bill would be made out by the Michigan Central Railroad Company for transportation of said goods over its line of railway, and not before.

These goods were, on the 17th of October, 1865, taken from the cars and deposited in the apartment of said building used as aforesaid by the defendant, in the place assigned as aforesaid for goods so destined.

At the time the goods in question were forwarded from Montreal, in accordance with the usage in such cases, a way-bill was then made out in duplicate, on which was entered a list of said goods, the names of the consignees, the place to which the goods were consigned, and the amount of charges against them from Liverpool to Detroit. One of these way-bills was given to the conductor who had charge of the train containing the goods, and the other was forwarded to the agent of the defendant in Detroit. On arrival of the goods at Detroit the conductor delivered his copy of said way-bill to the

checking clerk of defendant in said section, from which said clerk checked said goods from the cars into said section. It was the practice of the Michigan Central Railroad Company, before forwarding such goods, to take from said way-bill in the custody of said checking clerk, in the manner aforesaid, the place of destination and a list of said goods and the amount of accumulated charges, and to collect the same, together with its own charges, of the connecting carrier.

We are all of opinion that these acts constituted a complete delivery of the goods to the Michigan Central Company, by which the liability of the Grand Trunk Company was terminated.

1. They were placed within the control of the agents of the Michigan Company.

2. They were deposited by the one and received by the other for transportation, the deposit being an accessary merely to such transportation.

3. No further orders or directions from the Grand Trunk Company were expected by the receiving party. Except for the occurrence of the fire, the goods would have been loaded into the cars of the Michigan Central Company, and forwarded without further action of the Grand Trunk Company.

4. Under the arrangement between the parties, the presence of the goods in the precise locality agreed upon and the marks upon them "P. & F., St. Louis," were sufficient notice that they were there for transportation over the Michigan road towards the City of St. Louis, and such was the understanding of both parties."

The Pratt case held that there was a delivery of the goods *where one carrier had brought them into the freight station of the next connecting carrier and there deposited them in a section of the station set apart for the delivery of goods brought by the defendant for shipment over the line of such connecting carrier.* The freight station was owned and controlled by the Michigan Central Railroad Co., *the connecting carrier.* "The only use which the

defendant had of said section was for the deposit of all goods and property which came over its road or was delivered for shipment over it. This section, in common with the rest of the building, was under the control and supervision of the Michigan Central Railroad Company" (p. 44). The defendant, the first carrier, had only two men employed in the station whose duty it was to check freight as it came in. "All freight which came into the section was handled exclusively by the employees of the Michigan Central Railroad Company, for which, as well as for the use of said section, said defendant paid said company a fixed compensation." It also appears that the goods coming over the road of the Grand Trunk, the defendant, were unloaded and placed in the section by the Michigan Central Railroad Company, and were then loaded into its own cars by its own employees. *After the goods were brought in and unloaded the Grand Trunk representative "did not further handle said goods"* (pp. 44-45). The agent of the Michigan Central Railroad, whenever he saw goods being loaded by his employees in the section for the Grand Trunk, would go to the representative of the latter railway company and get a list of the goods with place of destination. From the information thus obtained, the Michigan Central agent would make out a bill for the goods (p. 45).

Then, substantially, all that the Grand Trunk employees did in connection with the goods was, while watching the loading of the same by the employees of the Michigan Central Railroad Company, to check them off with the way-bill. They did not move the goods or have any control over them. The Michigan Central could send the goods on when it chose. It did not need to apply to the Grand Trunk. It did not have to give a receipt for them. The goods were not pointed out. *In fact, the first carrier had no further control over the goods.*

But in the case at bar the facts are quite the reverse. In the first place the wharf was owned

and controlled by the Railway Company (pp. 31, 32). It employed the men at work on the wharf. No one could go on the wharf without the permission of the clerk in charge (p. 78). It unloaded the cotton when it chose to, one, two or seven or any number of days after its arrival at Westwego (p. 107). Its employees after unloading it placed it where they chose, in the sheds or on the open platform (pp. 76-77). They placed it where it could be easily obtained by the ship, if they chose, or where it could not be found except by search, and where they would have to move it again before delivering to the ship. The Railway Company employed the watchmen on the wharf (p. 33), and the wharf was in all respects in its sole charge.

No paper sent to the Steamship Company in any way indicated on what part of the dock the cotton to be shipped had been placed either originally or subsequently. Therefore, when the ship came for the cotton its employees knew nothing of the position of the cotton, and consequently the representative of the Railway Company was obliged to show the ship's representative the location of the lots of cotton to be thus delivered (p. 49), and if it was not convenient for the ship to take the cotton from where it happened to be, then the employees of the Railway Company had to remove it to a place where the ship's employees could get at it (p. 50). After the cotton had been counted over by the ship's representative, if the cotton was all there, he would then give a mate's receipt for it (p. 49); and not until then did it come into the custody and control of the ship. And then, and not till then, could the cotton in any sense have been considered actually or constructively delivered to the Steamship Company.

In short the decision in the Pratt case was expressly stated to rest upon a condition of facts quite the contrary to those in the case at bar, viz.: (1) The goods were within the control of the connecting carrier. (2) No further orders or directions were

expected from the first carrier, and had the fire not occurred the goods would have gone forward without further action on the part of the first carrier. (3) A precise locality had been agreed upon between the parties for a deiivery of the goods, at which place they went out of the control of the first carrier.

In the case at bar, *for the whole period after the cotton had been unloaded and until the actual delivery to the ship and the taking of receipts, the cotton was still absolutely under the direction and control of the Railway Company.* It could move it about anywhere it chose and as often as it chose. No precise location for the cotton had been agreed upon between the parties in the case at bar, as was the fact in the Pratt case, when the control of the first carrier should cease and that of the connecting carrier should begin. This did not happen in the case at bar until the cotton was actually pointed out, counted over and receipted for, and this was never done until the ship was at its berth and its representative on the wharf.

Another case relied upon by the Railway Company is that of *Converse* vs. *The Norwich and New York Transportation Company*, 33 Conn., 166.

In this case there is no clause relating to "actual custody."

There the goods were taken aboard the *City of Boston*, one of the steamboats of the defendants, and carried to New London and there landed and put into a depot building on the wharf during the night of Saturday, May 7, 1864, and there destroyed by fire on the afternoon of Sunday, May 8th.

It appears from the evidence that the goods in question were deposited by the defendants in the usual place of deposit for freight brought by them and destined for points on the line of the railroad; that the common course of business in regard to such freight was for the defendants' agents to make out a way-bill of the several articles brought on

each trip and hand it to the agents of the railroad at New London shortly after the arrival of the boat; that the latter loaded the freight on board their cars, taking it from the place where the defendants were accustomed to deposit it, and checked each article upon the way bill as it was taken up; and that if any article described in the way-bill was not found or was found in bad order, the defendants were accustomed and expected to look it up or put it in good condition.

The Court, in discussing the question of delivery, said:

> "The remaining question, namely, whether there was or was not a performance of the contract set up in the second count, and an actual delivery to and acceptance by the Northern road, so that the responsibility was shifted on to that corporation, is one we have deliberately considered, and feel constrained to decide in the affirmative.
>
> It must be conceded that the defendants had transported the wool to their terminus and carried and placed it in the common depot by the side of the railroad track, at a spot where they by usage were expected by the Northern road to place it, *and that no other or further act of carriage or actual manual possession* was or could be expected of them. And so it must be conceded that actual manual possession had not been taken by the Northern road, nor is there any direct evidence of an express agreement that the carriage to and placing at the side of the track in the depot should be deemed a delivery to the road. We have no difficulty in determining, indeed *we must hold that there was a mutual agreement or tacit understanding, equivalent to such an agreement, that the transportation company should place the through freight at that precise spot and that the Northern road should take it from thence at a time convenient to them.* The construction of the depot and uniform usages are conclusive of it. The depot was constructed with a platform by the side of the track for the reception of goods to be taken from or put into the cars, and on

that platform the railroad company in the first and every instance of delivery by them placed their freight, and the transportation company at their convenience took it away and carried it on board their boat. And so the transportation company in like manner in the first and every instance placed there the freight for the Northern road, and they at their convenience put it in their cars and took it away and the usage was precisely the same with the Worcester road. * * * The depot was not the joint depot of the two parties only or erected for that purpose only, but the joint depot of three, including the Worcester road and erected for and used by each, not only for the mutual delivery and reception of through freight, but independently in transacting their independent local business. * * * This depot was a wharf, covered and enclosed indeed, but still a wharf, the only one occupied by them. *Upon this wharf and into the enclosure the Northern road laid their track for the delivery and reception of freight to and from the transportation company. Both parties then contemplated a delivery and reception on this wharf and in this enclosure and obviously in the precise manner actually pursued.* * * * *It is clear then that both the transportation company and the Northern road contemplated that the placing of freight by either intended for the other upon that platform was all that either was to do by way of delivery of their freight to each other*" (pp. 180–183).

In the Converse case the wharf and depot buildings were the property of the railway company, the connecting carrier. The transportation company, the original carrier, paid an annual rental for the use of the wharf in connection with the connecting carrier and a third company. Each of these companies transacted on the wharf an independent local business, aside from that of the mutual transfer and delivery of through freight (p. 182).

The tracks of the connecting carrier were run up to and along the platform. When the goods in

question were unloaded by the original carrier upon the wharf, they were deposited in the usual place of deposit for freight brought by it and destined for points on the line of the connecting carrier. The course of business was for the agent of the original carrier soon after the arrival of the boat, to hand the way-bill to the agent of the connecting carrier. When goods were unloaded and the way-bill handed to the connecting carrier nothing further was required of the original carrier. The connecting carrier, when convenient to it, loaded the goods so deposited on to its cars from the precise spot where they had been deposited by the original carrier. That was the custom established between them.

A comparison of the facts in the *Converse* case with those in the case at bar shows them to be in marked contrast. The Connecticut Court stated that had there not been insuperable difficulties in the way it would have been very willing to hold that there had been *no delivery at all* and that there was a joint holding of the goods in deposit by mutual arrangement. These insuperable difficulties were, (1) the mutual agreement that the Transportation Company should place the goods at the precise spot where they were actually placed and that the connecting road should take them from that spot at its convenience; (2) the mutual contemplation of the parties that the goods should be delivered and received there in the manner actually pursued; (3) that all that was contemplated to make a delivery by one party to the other was the placing of the goods on the platform; (4) that no further act was expected of the Transportation Company than the deposit of the goods on the platform; (5) and, not least of all, that the Transportation Company had carried the goods to the end of its line.

Another case relied upon by the Railway Company is that of *Merriam* v. *Hartford & New Haven Railroad Company*, 20 Conn., 354.

This was an action on the case for negligence on the part of the defendants in the transportation

and delivery of certain goods belonging to the plaintiff. In this case, again, there are no clauses in the contract similar to those contained in the bills of lading under discussion.

The facts are stated in the opinion. The Court said:

> "The plaintiff claimed to have proved on the trial that the property to recover the value of which this action was brought was delivered by him to be transported by the defendants as common carriers in the City of New York to Meriden on a dock in said city, which was the private dock of the defendants and in their exclusive use, for the purpose of receiving property to be transported, and that it was delivered there in the usual and customary manner in which the defendants received property for transportation; and the Court charged the jury that such delivery at said dock was a good delivery to the defendants to render them liable for the loss of the property, although neither they nor their agents were otherwise notified of such delivery. The defendants insist that they were not chargeable for it unless they had express or actual notice of such delivery, and that the jury should have been so instructed * * * (p. 360).
>
> If they [the parties] agreed that the property may be deposited for transportation at any particular place without any express notice to the carrier, such deposit merely would be a sufficient delivery. So if in this case the defendants had not agreed to dispense with the express notice of the delivery of the property on their dock, actual notice thereof to them would have been necessary; but if there was such an agreement, the deposit of it there merely would amount to constructive notice to the defendants and would constitute an acceptance of it by them; and we have no doubt that the proof by the plaintiff of a constant and habitual practice and usage of the defendants to receive property at their dock for transportation in the manner in which it was deposited by the plaintiff, and without any special notice of such deposit, was competent

> and in this case, sufficient to show a public offer by the defendants to receive property for that purpose and in that mode, and that the delivery of it there accordingly by the plaintiff in pursuance of such offer should be deemed a compliance with it on his part, and so to constitute an agreement between the parties by the terms of which the property, if so deposited, should be considered as delivered to the defendants without any other notice. Such property and usages was tantamount to an open declaration, a public advertisement by the defendants, that such a delivery should of itself be deemed an acceptance of it by them for the purpose of transportation and to permit them to set up against those who had been thereby induced to omit it the formality of an express notice, which had thus been waived, would be sanctioning the greatest injustice and the most palpable fraud" (p. 361).

In the Merriam case the dock belonged to the carrier receiving the goods, *and so they came into its possession and control*, while in the case at bar the goods were still on the dock of the Railway Company, and absolutely under its control.

The Merriam case has no legal relation to the questions involved in the case at bar.

Another consideration seems absolutely conclusive of the claim of delivery. The Railway Company reserved the liberty to ship the cotton by *any other steamship or steamship line*, and further provided in the bills of lading that the contract should be accomplished only when the cotton had been delivered either to the Elder, Dempster Line, or some other line. Such delivery, it was provided, should be parting with the *actual custody* of the goods. The evidence is uncontradicted that the Railway Company had the actual custody of the cotton.

(2.) *There was no constructive delivery of the cotton by the Railway Company.*

There is no testimony on which to base a claim for constructive delivery excepting the sending of the

notices of the arrival of the cotton. Even if under other circumstances this could be considered a constructive delivery it cannot in the case at bar, for by the terms of the bills of lading the Railway Company is prevented from even claiming a constructive delivery. These bills provided that that carrier should be liable in whose *actual custody* the cotton should be at the time of loss.

The facts show, as we have seen, that the Railway Company had the actual custody.

As the Court at Circuit very properly said in directing a verdict for the shippers:

> " Under this particular contract, whatever the relations between the two carriers might be, whatever mutual rights or obligations might arise by reason of notices passing between them, as between the first carrier and the shipper, the contract of carriage and the liability as a common carrier could be terminated *only by the transfer of the actual custody* from the first carrier to the second carrier, or by some notice brought home to the shipper of a modification of the contract " (fols. 510-511).

And there is no evidence of any such notice to the shipper.

Third Point.

The Circuit Court did not err in refusing to direct a verdict for the Railway Company at the conclusion of the testimony upon the ground that the relation of that company to the shippers was that of warehouseman and not that of common carrier.

(1.) *The bills of lading, herein provided in express terms* that that *carrier* alone should be liable in whose actual custody the cotton was at the time of its loss.

(2.) *There is no pretense of any action of the Railway Company indicating an attempt to store the cotton, nor any pretense that the shipper of the goods was ever notified of any attempt of the carrier to store the cotton, or was informed in any respect of the progress of the contract or the treatment by the Railway Company of the cotton.*

(3.) *The questions arising when an intermediate carrier attempts to relieve itself of its liability as a common carrier after it has carried to the end of its line have been so frequently before the courts that the law upon that point is well settled and may be stated as follows:*

A connecting carrier does not change his responsibility as a common carrier to that of a warehouseman by storing goods while in transit. It must do some act indicating a clear purpose to make an end of its relation as a carrier. Without such act the storage will be considered as a mere accessory to the transportation and not as changing the nature of the bailment.

In *Railroad Company* v. *Manufacturing Co.*, 16 Wall., 318, the railroad company agreed to transport wool over its road to its depot in Detroit and there deliver to a succeeding carrier. The goods remained in the depot at Detroit and were there destroyed by fire. During all the times the wool was in the depot it was ready to be delivered for further transportation. The Court said:

> (It is the rule that) "it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line and to deliver to the next carrier in the route beyond. * * *
>
> "Public policy, however, requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route, without delivery or an attempt to deliver to the connecting carrier. If there be a necessity of storage it will

be considered a mere accessory to the transportation and not as changing the nature of the bailment. It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by any act indicating an intention to renounce the obligation of a carrier, will not change or modify even his liability" (p. 324).

A leading case is that of *Goold* v. *Chapin*, 20 N. Y., 259, and the authority of that case has been accepted and adopted in the State Courts of Illinois, Michigan, Wisconsin and other States:

In *Goold* v. *Chapin*, 20 N. Y., 259, the defendants were common carriers on the Hudson River, between New York and Albany, and received goods at New York to be transported to Albany, directed to the plaintiffs at Brockport, to the care of H. Fields & Co., Brockport, N. Y., per Atlantic Line, a line of canal boats running on the Erie Canal, and transporting merchandise from Albany to Brockport and Buffalo. The barge *Plymouth*, with the goods, arrived at Albany on the morning of the 14th August, 1846, and the next day the merchandise was discharged by the defendants from the barge to a float belonging to them lying in the Albany basin. The float was a vessel lying upon the water in the basin, and was used by the defendants as a place for storing and delivering goods to the canal-boats which were to carry them West. The boats came alongside of the float and received the goods. The float was prepared for the purpose of delivering the goods to the canal-boats with the necessary apparatus for lowering merchandise into the boats. The defendants made a practice of delivering goods from the barge to the float as soon as they could be discharged after arrival. The float was used exclusively for goods brought up the river in the defendants' barges or vessels. The defendants had at the time two warehouses at Albany, one on the dock and the other on the pier. On Tuesday, the 15th August, after the goods had been removed from the barge to the float,

an agent of the defendants gave notice to the agent of the Atlantic line, at its office on the dock at Albany, that there were goods on board the defendants' float for his line, and requested him to come and take them away, which notice and request was repeated on Wednesday and Thursday mornings. When notice was given on Thursday to the agent of the Atlantic line he replied that he was then taking some goods from the Eckford line of towboats on the river, and that as soon as he got them on he would have them shove up to the float and take on what goods they had for his line. In the afternoon of Thursday, August 17th, the float and the goods were consumed by fire. The fire did not originate from any want of care or skill on the part of the defendants, but from the want of care of some person or from accident and not by lightning. It was known to many merchants and forwarders, and the owners and agents of the Atlantic line, that the defendants' line discharged their up freight into their float and from thence into canal boats; but the *plaintiffs had no notice or knowledge* that they did so. The Atlantic line had no interest in the defendants' float. The goods were checked and an account taken of them as they were delivered from the float to the canal-boats, and the account rendered at the defendants' office. The defendants discharged their goods from the barge into the float, and then their hands in the boat delivered them to the hands in the canal-boats.

The Court said: "The cause and circumstances of the destruction (of the goods) were such as a common carrier is bound to answer for, but not such as suffice to charge a bailee for custody merely.

The important inquiry, therefore, is whether the goods at their destruction were in the custody of the defendants as carriers. The goods were delivered to the defendants in New York to be carried to Albany and there delivered to another carrier to be transported to Brockport, N. Y. (p. 262).

In *Van Santvoord* v. *St. John*, 6 Hill. 157, it was held that the first carrier's obligation was discharged when he had safely delivered

the goods to the next carrier, but that case did not present any question as to what would amount to such a delivery. The same remark is applicable to Ackley *v.* Kellogg, 8 Cow., 223. In both cases the second carrier had actually received the goods and was chargeable as carrier for their safety. It is found by the Referee in this case—and as we have not the evidence we must certainly assume the finding to be well warranted—that the Atlantic line did not receive the goods from the defendants within a reasonable time after notice was given of their arrival and a request that they should be taken away. Assuming that such notice if given to the owner at the end of the transit, and the unreasonable delay in taking the goods, would have put an end to the liability of the defendants as carriers, *yet, as I think, the cases and the nature of the transaction itself point to a distinction between that case and the case of consignee or second carrier.* If an undue refusal to receive by the owner at the end of the transit would justify the carrier in renouncing all further care over the goods, *it would not in the case of consignee or subsequent carrier where these relations were known to the first carrier.* * * * *Now, the goods in this case were transferred from the boat to the float to enable the defendants to complete their contract by making delivery.* The float was not a storehouse in the proper sense of that word; it was a part of the machinery to facilitate the business of carriage which the defendants adopted for their own convenience in performing their contracts to carry and deliver. *When the goods were unladen from the boat on which they were brought up the river and placed upon the float it was a step in the performance of the contract to deliver but not a delivery.* The performance was not by that act complete. *It was a mode of delivery which undoubtedly promoted the convenience of both sets of carriers, but it did not alter the responsibility of the first carrier who had not yet made delivery. There was no refusal to receive on the part of the second carrier, but there was unreasonable delay.* The defend-

ants, however, did not find this delay so unreasonable as to feel compelled to make a new disposition of the goods; they did not remove them from the exposure of a floating vessel from different parts of which goods were being delivered to different lines, and place them in store. *They indulged the other carriers in the delay as from the course of business was natural and suitable; and until some act was done on their part indicating a clear purpose to make an end of their relations as carriers as to these goods, I think their responsibility as such continued.* No owner can be supposed to have an agent to superintend each transhipment of his goods in the course of a long line of transportation; and if the responsibility to each carrier is not continued until delivery in fact to the next carrier, or at least until the first carrier, by some act clearly indicating his purpose, terminates his relations as carrier, we shall greatly diminish the security and convenience of those whose property is necessarily abandoned to others, with no safeguards save those which the rules of law afford. The stringency of the rules belonging to this species of bailment had its origin in public policy which long experience has approved as wise and salutary. Any other rule in respect to the duty of carriers at such points of transshipment when unmodified by custom than that above contained, would give rise and afford protection to the same class of mischiefs against which public policy has protected the community by the strict responsibility imposed upon carriers in other cases (pp. 262–265).

* * * * *

"*The defendants did not change their responsibility as common carriers and adopt that of warehousemen, by removing the goods from their barge to their float on their arrival at Albany. The change was their own act, without consultation with or notice to the plaintiffs or their agent; the goods were still subject to their control and there had been no actual delivery;* the float was in effect a substituted means of conveyance furnished by the defendants. By placing the goods on

that, the transit from the plaintiffs to their agent was not terminated. It was so decided by this Court in the case of *Miller* v. *The Steam Navigation Company*, 6 Seld., 431. In that case as in this, there had been a removal of the goods from a barge to a float, and Judge Jewett said, 'there was nothing to show an intention to store the goods, or anything to justify the defendant to do that, if such had been the intention. *The facts and circumstances show conclusively that the defendant, instead of being engaged in storing the goods, was placing them in a situation to deliver them according to its contract. The goods had not been placed entirely in a condition to deliver them when the accident happened. The defendant was at no time discharged of the responsibility which it had assumed as a common carrier.*'

There is undoubtedly an important difference between that case and the one which I am now considering. In that there had been no delay by the agent of the intended receiving line in furnishing the requisite means for the delivery of the goods; in this case there were repeated delays. *Notices that the goods were ready for delivery and calling for their reception, had been given to the agent of the Atlantic Line on three successive days.* No canal boat was sent to the float to receive the goods on either day, but on the third day the agent, on being served with the notice, 'replied that he was then taking some goods from the Eckford Line of towboats on the river, and that as soon as he got them on he would have them shove up to the float and take on what goods they had for his line.' *The goods were retained on the float until they were consumed by a fire on the afternoon of the same day.* The Referee finds that the Atlantic Line did not receive (he doubtless meant furnish the means to receive) the goods within a reasonable time after notice from the defendants of the arrival of the goods and after the defendants had requested the agent of that line to take them away. *The question is whether by reason of this delay the defendants were relieved from their responsibility as common carriers at the time of the fire. Of*

course there had been no delivery. The goods were still in possession of the defendants and subject to their control. If they had the power to change the character of their possession, when was it changed? *Not surely at the moment of serving the notice.* A reasonable time for taking possession of the goods by the Atlantic Line must undoubtedly have first elapsed. If there had been no delay there could have been no hiatus between the responsibilities of the two. When the responsibility of the defendants had terminated, that of the Atlantic Line would have commenced. *When goods are forwarded by connecting lines, the owners have a right to consider them under the safeguard of a constant responsibility until they reach their place of destination.* * * * To be sure, where there is no partnership between the proprietors of the several lines they should not be held responsible for the conduct of each other, nor can they be. In this case the delay of the Atlantic Line in receiving the goods did not impose upon the defendants the necessity of retaining possession of them beyond a reasonable time for their reception after service of the notice. They might have unquestionably deposited the goods in a warehouse, and thus have relieved themselves from further responsibility; or they might, as they did, elect to retain them in their own possession. As they chose to retain them it must have been in their original character as common carriers. *If they had intended to make a change, common fairness required that they should have given notice to the Atlantic Line to that effect. But that would have been insufficient, as the agent of that line would have no authority to relieve the defendants except by receiving the goods in behalf of his principals.* No great wrong can be done to common carriers in ordinary cases by holding them to their responsibilites as such until they part with the possession and control of the goods, either by delivering them to the consignees or depositing them in a warehouse where, as in this case, one is accessible. It may subject them to some inconvenience, but it is better to do that than to expose the

owners of goods, who are not usually present, so as to protect their own interests, to losses by reason of the misconduct or omissions of the managers of the different lines at their places of connection. The defendants retained the goods on their float probably from an expectation that they would soon be taken by the Atlantic Line, and possibly to save themselves the trouble of depositing them in a warehouse. *In doing so they consulted no one but acted at their own option* and as I conceive, at their own risk" (pp. 265-267).

If this case, universally regarded as a leading one on the subject, be rightly decided, it would seem to dispose of the contention of the Railway Company that its liability as carrier had ceased, and that its relation to the shippers was changed to that of warehouseman. In both cases the ownership, in the one case of the float, in the other of the wharf, was in the first carrier, the one depositing the goods for the purpose of delivering to the next carrier, and both places were used exclusively for the goods of the first carrier. The defendants in the Goold case had a warehouse in Albany and the Railway Company in the case at bar had one in New Orleans.

The defendants in the former case sent a notice to the connecting carriers that there were goods on the float for its line, and requested it to take them away, which notice and request was repeated twice.

Although notices of the arrival of part of the cotton were sent in the case at bar, the evidence does not disclose even a request to take this cotton away, much less is there any proof of delay on the part of the connecting carrier in respect to it. The railway company had contracted to bring to New Orleans a very large amount of cotton during the cotton season. The contract under which the cotton in this suit was brought provided for 20,000 bales to be delivered to Elder, Dempster & Co. during the months of October, November and December. Besides this contract, it had contracts with various

other steamship companies (p. 47). The result was a great accumulation of cotton at Westwego. Mr. Miller states that at the time of the fire there were about twenty thousand bales on the wharf and about two thousand bales in cars (p. 35) not unloaded because the wharf was full. The Railway Company, therefore, applied to the steamship agents, once about ten days before the fire, and again on the day of the fire, to assist them in relieving the congestion. But nothing was said as to particular lots of cotton.

There is no proof of a request to take away any of the cotton in this case, nor is there any question of reasonable time to perform the contract, involved. By the contract deliveries of 20,000 bales of cotton were to be made to the Elder, Dempster Line in October, November and December, 1894, and the Railway Company had entire liberty to ship by any other Steamship Line.

The evidence of Mr. Miller, pages 40 and 41, shows conclusively that during the whole week prior to the fire, that is, from a time prior to the first receipt by Elder, Dempster & Company, of any notification concerning any of the cotton in this suit, both of the berths at the wharf at Westwego were fully and continuously occupied by other ships loading there.

If the question of reasonable time entered into this case, as it does not, the proof shows that no matter how many ships Elder, Dempster & Company might have had ready to take this cotton in suit, by the act of the railway company it had no opportunity to take away this cotton, for there was no place at the dock at which to berth any ship to take away such cotton.

However unlike the case at bar is from the Goold case on the point of delay, the two cases are alike in that the arrangement for the delivery on the float in the Goold case, and on the wharf in the case at bar, was an arrangement unknown in both cases to

the shippers, and was one for the convenience of the carriers only.

The first carrier in both cases still had the custody of the goods, and there was no delivery until their employees actually delivered the goods into the hands of the connecting carrier.

The Court said in the Goold case that when the goods were unloaded and placed on the float it was a step in the performance of the *contract to deliver* and not a delivery, and that while the referee had found delay on the part of the connecting carrier, that the first carrier had nevertheless "indulged the other carriers in the delay as from the course of business was natural and suitable; and until some act was done on their part indicating a clear purpose to make an end of their relations as carriers as to these goods, their responsibility as such continued" (p. 264).

Except for the question of delay, is this not the situation in the case at bar? There has been no delay proved here, but even had there been the case would be precisely parallel with the Goold case and the language quoted above would apply here.

What was done by the Railway Company indicating a clear or any purpose to make an end of its relation as a carrier? What act of the Railway Company worked this change in its relations and duties to the shipper? Surely not the sending of the notice of arrival, for as the Court in the Goold case said that does not indicate such a purpose nor could any such notice affect the shipper's rights. What else? The Railway Company treated these bales of cotton precisely as other bales where a transfer of possession was had before the fire. The cotton was unloaded and placed on the wharf. Afterwards notice of arrival was sent. But no act was done by the Railway Company indicating any purpose to make an end of its relation as a carrier. Whether these particular goods were under the sheds or on the open wharf does not appear; all we know is that they were piled up on the wharf. And

the sheds were open. The wharf was under the absolute control of the Railway Company.

As in the Goold case: "The facts and circumstances show conclusively that the defendants, instead of being engaged in storing the goods, was placing them in a situation to deliver them according to its contract. The goods had not been placed entirely in a condition to deliver them when the accident happened" (p. 265).

Mr. Miller has testified in the case at bar that the cotton had to be moved again by the Railway Company, if necessary, before the cotton was actually pointed out and delivered to the steamship company, and therefore in unloading the cotton at Westwego the Railway Company was merely placing it in a situation to deliver it.

As Mr. Miller says (p. 48):

> "Q. What was the next step after you sent the transfer slip to the Steamship Company?
> A. Then it remained for the Steamship Company to take delivery of the cotton, send a steamer to Westwego and get it," &c.

It is important in this connection to consider the provision of the bills of lading that the cotton should be transported * * * from the port of New Orleans to the port of Liverpool, England, by the Elder, Dempster & Co. Steamship Line, *with the liberty to ship by any other steamship or steamship line* (pp. 92–94, 96–98). Why this reservation of liberty to ship by another ship or line? Is it not clear that by this provision the Elder, Dempster & Co. line does not become under the contract the connecting carrier until a delivery to it? The Railway Company reserves to itself the liberty of sending the cotton in suit from New Orleans by any other ship or line of ships. It had a contract with the Elder, Dempster line for a gross quantity of 20,000 bales, but there is no specification of, or designation of the cotton in suit, or of any other cotton. The Railway Company might at any time,

so far as the shipper or the contract is concerned, ship by any other line. Is this not a provision that would compel the Railway Company, in case of inability of the Elder, Dempster & Co. to take the cotton within a reasonable time after arrival, or should its ships be delayed in taking same, to send the cotton forward by another carrier? Certainly it throws the liability for unreasonable delay, if any, in sending the cotton forward from New Orleans upon the Railway Company.

The Circuit Court commented on this provision in the bill of lading reserving the liberty to forward by any other line than the Elder, Dempster & Co. as follows: "The very contingency of the failure or neglect or refusal of the second carrier to accept the goods from the first carrier is provided for, because it is left optional with the first carrier to send them forward by any other steamship line than the Elder, Dempster Steamship Company" (p. 89).

An attempt is made in the appellants' brief (p. 77. *et seq.*) to show that this liberty to ship by another line of steamships was a liberty confined to the Elder, Dempster Line. How can this be so? Such construction is directly opposed to the plain reading of the contract, and why should the Railway Company be deprived of this privilege in case of the refusal or inability of the Elder, Dempster Line to receive the cotton?

The authority of *Goold* vs. *Chapin* is followed in *Mills* vs. *The Michigan Central R.R. Co.* (45 N. Y., 622). Where it is said that the first carrier can only be discharged from its liability as a common carrier "by a delivery to the next carrier in the line of transportation, or by a notice to him that it was ready for delivery, and the lapse of a reasonable time for him to take it away, and in the event of his neglect so to do, the proper storage of the same, or by the doing of some act indicating a renunciation of the relations of carrier" (p. 625), citing *McDonald* vs. *West. Trans Co.*, 34 N. Y., 497, and *Goold* vs. *Chapin, supra.*

In this connection it was also said:

"But there needed not only notice to the carrier next in line of the arrival of the wheat, but a lapse of reasonable time for him to take it away, and in his neglect so to do *some disposition of it by the defendant*, indicating its intention no longer to be charged as carriers of it. What shall be a reasonable time is also to be determined by the circumstances of each case" (p. 626).

No act was done by the railway company in regard to this cotton after unloading it except the sending of the notices of its arrival. The cotton was allowed to remain on the dock where it was unloaded and placed *before* the sending of the notices. If there was delay by the steamship company, the railway company acquiesced in such delay.

Another leading case in New York is that of *Ladue* v. *Griffiths*, 25 N. Y., 364.

In this case the plaintiffs caused to be shipped at Detroit on board the steamboat *Hudson*, bound for Buffalo, to be transported East accompanied by a document in the form of a bill of lading, twenty-seven rolls of rough leather, of which they were the owners. The bill of lading specified the property, and stated the charges of the forwarding agent at Detroit, the amount of the Lake freight, and that it was to go from Buffalo to East Albany at certain rate of freight. It was addressed in the margin thus: "Leander Warner, Leicester, Mass., *via* Clappville Depot, to be delivered at East Albany, care J. M. Griffith & Co. (the defendants), Buffalo." It did not appear to be signed by the master or any one, except H. N. Strong, the forwarder at Detroit. The defendants' place of business was at Buffalo, where they were engaged in transportation on the Erie Canal, from that City to Troy and Albany. They were also forwarders and warehousemen, and they were accustomed to re-

ceive daily from the West property consigned to them in the same manner as the leather in question, and to ship the same to its destination at the East by their canal line or by other boats on the canal, whichever left first. On the arrival of the vessel from Detroit, on the first day of July, the leather was taken to defendants' storehouse and they made an endorsement on the bill of lading as follows: "Received and paid charges, John M. Griffith & Co." It remained in the storehouse until it was burned, as before mentioned. The fire took place July 4, 1851. The goods were shipped in the latter part of June. *The defendants insisted that as to this property they were storehouse-keepers and forwarders not common carriers.*

The Court said:

> "When the property in question was delivered on board the steamboat *Detroit*, marked and consigned to Leander Warner, Leicester, Massachusetts, it was so delivered for transportation to that place. It was known to the shipper, doubtless, that the steamboat *Hudson* could carry it no further than Buffalo, and it was therefore consigned to the care of the defendants at that place, who were carriers on the Erie Canal, to be carried and forwarded by them by canal in the regular course of business to Albany, and then to deliver the same at East Albany, at the railroad depot, to be further transported * * * to Leicester, Mass. The direction upon the bill of lading consigning the leather to the care of the defendants at Buffalo, made it the duty of the master of the steamboat to deliver it to them, and gave them the right to receive it from them, and thus secured to the defendants the profits incident to the transhipment, storage and carriage of the property until its transportation by canal was completed, and the property delivered at the railroad depot at East Albany.
>
> *No right or duty, in respect to such property, was conferred by the owner upon any person after its delivery on board the steamboat at Detroit, except that of carriage, and*

such as was incident to its transportation, until its delivery to the consignee at Leicester, Mass. The proprietors of the steamboat Hudson received it as carriers, and so did the defendants, subject, respectively, to all the duties and responsibilities of carriers.

These goods were placed by defendants in their warehouse for their own convenience, and for the purpose of being carried, and when goods are so stored the carrier is responsible for their safe keeping.

The owner of this property had no occasion to have the same placed in a warehouse at Buffalo for any purpose except such as pertained to its safe keeping during its transportation. It was not intended to be stored in warehouses at Buffalo for any purpose. It might doubtless have been transferred immediately from the steamboat to the Canal Company at Buffalo; *but if the defendants chose for any purpose to put it in their warehouse, it was to subserve their interests, and was at their own risks.* The claim of the defendants to escape responsibility for the loss of these goods upon the ground that they were simply warehousemen, and received them in that capacity, we think entirely untenable.

When a person is both carrier and warehouseman, it is well settled that the deposit of the goods in the warehouse is a mere accessory to the carriage, and not subject to any particular order of the owner, or if they are deposited for the purpose of being carried further, the responsibility of the party having them in charge is that of carrier. But when goods are deposited in a warehouse, subject to the further order of the owner, the case is otherwise. * * * *But this rule (as to warehousemen) cannot apply to any person having the charge or custody of the goods while they are in transitu. While the goods are in the process of transportation from the place of their receipt to the place of destination, it will never do in this country,* in my opinion, *to subject them in the hands of any carrier, or by his act or order, to the responsibilities of a mere warehouseman.* The carrier at common law is an insurer of the goods as against all accidents and perils, ex-

cept such as result from the act of God or a public enemy. A warehouseman is only responsible for ordinary care and is merely responsible for loss or injury resulting from his own default or negligence. * * * Goods are shipped and delivered to carriers by land at the seaboard or in the interior of the country, for transportation to different points, with a simple direction endorsed of the name of the owner or consignee and the place of delivery. *It would never do to hold that at any intermediate point such goods at the option of the carrier might be stored in a warehouse and the carrier relieved thereby of his proper responsibility.* If the defendants had owned the steamboat in which these goods were shipped at Detroit, no one would pretend, I think, that they could store them at Buffalo in a warehouse at the risk of the owner for their own convenience.

I conceive the responsibility of the defendants in respect to these goods, after they came in their possession, precisely the same, so far as related to their storage at Buffalo, as though they had been carried the whole distance from Detroit to Leicester, Mass. *Where there are several successive carriers who are engaged in the transportation of goods from the place of their reception to the place of their destination, the liability of each carrier will commence with the reception of the goods, and will continue until they are delivered according to the usage of the business of the next carrier in the line of the transit* (Van Santvoord *v.* St. John, 6 Hill., 158). *When a carrier deposits property in his own warehouse at some intermediate place in the course of his own route, or at the end of the route where it is his duty to deliver it to the owner, his duty as carrier is not completed, and he will remain liable as carrier for any loss for which common carriers are ordinarily responsible.* The defendants, I think, are responsible as carriers of the property in question upon the same principle; it was received and stored by them in their capacity or character as carriers as much as if they had received it at Detroit."

In the case at bar the wharves at Westwego had been recently constructed to facilitate deliveries to the steamships. The warehouses of the Railway Company were in the City of New Orleans (p. 32), and before the construction of the Westwego wharves it had made delivery to steamships by drays, and during the cotton season, when the fire occurred, cotton had been delivered in that way to Elder, Dempster & Co. at its wharf in New Orleans (pp. 83-84). The construction of the wharves shows that it was intended for a temporary place of deposit. The wharf was not even all covered, and the sheds were open. The uncovered portion was a mere platform. The railway employees unloaded the cotton and placed it anywhere they chose, under cover or not, as they pleased. They moved it about as they chose, had absolute control of it, and delivered it to the ship as ships arrive at the dock. The shipper did not know where his cotton was. It might be in warehouses at New Orleans, or on the open platform at Westwego, for all he knew. There is no proof that the shipper ever heard of Westwego at all, and it is not unreasonable to presume that he supposed, as he had the right to, that the delivery to the steamship company was made at New Orleans according to the terms of the contract. Under these circumstances is the claim of the Railway Company that it was a warehouseman as to the goods awaiting delivery at Westwego more than a desperate defense?

The cotton was placed on the wharf at Westwego for its own convenience. The deposit there was merely a part of the carriage and consequently did not change the liability of the Railway Company as a common carrier.

The principles of these New York cases have been approved in other States.

See *Illinois Central R. R. Co.* v. *Mitchell*, 68 Ill., 471.

In *Condon* v. *Marquette Railroad Co.*, 55 Mich., 2188, where Judge Cooley delivered the opinion of the Court, the defendant, a connecting carrier, had placed goods in its warehouse while in transit. From the point where the goods were so placed they were to be carried by another company. It was the mode of business for the receipt of goods to be entered at the warehouse upon the books of the defendant which were open to inspection to the next carrier, and which were regularly inspected by that company to ascertain what goods were to be taken by it. That company then would take the goods, load them in sleighs or vehicles at the warehouse and then receipt for them to the defendant. No notice was given to the next carrier that the goods had been placed in the warehouse. They simply remained in the warehouse until the fire took place.

The Court said that the question presented in this case had received the careful attention of the New York Court of Appeals in McDonald *v.* Western Railroad Corporation, 34 N. Y., 497.

The Court quoted from the opinion in that case, as to what amounts to a release of the carrier from its common law liability, and stated that it was there held that the deposit of goods in a warehouse while *in transitu* was a mere accessory to the carriage. The Court continued

> "This decision was approved as sound and followed as authority in Mills *v.* Michigan Cent. R. R. Co., 45 N. Y., 622, and it is undoubtedly the settled law of New York at this time (p. 221). * * * We think these cases lay down a rule which is just to the shippers of goods, and not unreasonably burdensome to carriers (p. 222). * * * The connecting carriers in this case appear to have established a custom of their own, under which actual delivery of the goods or notice to take them was dispensed with, and the one was to ascertain from the books of the other what goods were ready for reception and further carriage.

> This as between themselves was well enough while it worked well; but it was an arrangement to which the plaintiff was not a party, and the defendant could not by means of it relieve itself of any liability which duty to the plaintiff imposed."

As the Circuit Court of Appeals well says (p. 117):

> "There is no room for contention that the defendant had ceased to be a carrier and become a warehouseman. It had done no act evidencing its intention to renounce the one capacity and assume the other. Although it had requested the steamship line to remove the cotton, it had not specified any particular time within which compliance was insisted upon, and had not given notice that the cotton would be kept or stored at the risk of the steamship line upon failure to comply with the request. The request to come and remove it as soon as practicable was in effect one to remove it at the earliest convenience of the steamship line. There is nothing in the case to indicate that the defendant had not acquiesced in the delay which intervened between the request and the fire."

In addition to this it must be recollected that the alleged conversation between Pearsall, the Division Superintendent of the Texas and Pacific Railway Co. and Mr. Warriner, which is narrated on pages 80, 81, took place on Monday, November 12, and the fire occurred on that night (p. 80).

Also it must be remembered that for the week preceding the fire, the vessels of the Elder Dempster Steamship Company and other vessels had occupied all the dock room that there was at the Westwego wharf (pp. 40 and 41).

We submit that both on principle and authority the Railway Company did not relieve itself of liability as a common carrier.

Fourth Point.

The judgment below was right and should be affirmed.

TREADWELL CLEVELAND,
Of Counsel.

Counsel for Parties.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* CLAYTON.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 222. Argued January 27, 1899. — Decided February 20, 1899.

The Texas and Pacific Railway Company received at Bonham, in Texas, 467 bales of cotton for transportation to Liverpool. It was to be taken by the company over its road to New Orleans, and thence to Liverpool by a steamship company, to which it was to be delivered by the railway company at its wharf in New Orleans. Each bill of lading contained the following, among other clauses: "The terms and conditions hereof are understood and accepted by the owner, viz.: (1) That the liability of the Texas and Pacific Railway Company, in respect to said cotton, and under this contract, is limited to its own line of railway, and will cease, and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; and in case of any loss, detriment or damage done to or sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of such damage, detriment or loss." The cotton reached New Orleans in safety, and was unloaded at the wharf, and the steamship company was notified; but before it was taken possession of by that company it was destroyed by fire at the wharf. The owners in Liverpool having brought suit against the railway company to recover the value of the cotton, that company, on the facts detailed at length in the opinion of the court, contended that the cotton had passed out of its possession into that of the steamship company; or, if the court should hold otherwise, that its liability as common carrier had ceased, and that it was only liable as a warehouseman. *Held*, that the goods were still in the possession of the railway company at the time of their destruction; and that that company was liable to their owners for the full value as a common carrier, and not as a warehouseman.

THE case is stated in the opinion.

Mr. Rush Taggart and *Mr. Arthur H. Masten* for plaintiff in error.

Mr. Treadwell Cleveland for defendants in error.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought by the defendants in error, subjects of the Queen of Great Britain and Ireland, against the Texas and Pacific Railway Company, a corporation existing under an act of Congress approved March 3, 1871, c. 122, 16 Stat. 573, and engaged in the business of a common carrier of merchandise for hire. Its object was to recover the value of four hundred and sixty-seven bales of cotton destroyed by fire.

The complaint alleged that in the month of October, 1894, at Bonham, Texas, the plaintiffs delivered to the defendant railway company 500 bales of cotton, which it agreed to carry safely and securely at a through price or rate from the place of shipment to Liverpool, England, by way of New Orleans and there deliver the same on the payment of the freight; that the defendant failed to keep its agreement and to carry safely 467 of the bales of cotton to Liverpool, and there to deliver the same, although the plaintiffs had duly demanded delivery thereof and had been at all times ready and willing to pay the freight for the carriage; that through its negligence and carelessness and without the fault of the plaintiffs those 467 bales, worth $17,314.43, were on or about November 12, 1894, wholly destroyed by fire at Westwego, Louisiana, "at which time and place the same were in the possession of the defendant in the course of such carriage and as a common carrier;" and that the defendant has refused upon plaintiffs' demand to pay the value of the cotton so destroyed.

The defendant admitted the destruction of the cotton by fire at the time and place named, but made such denial of the material allegations of the complaint as put the plaintiffs on proof of their case.

The plaintiffs having read in evidence the bills of lading, and made proof of the value of the cotton as shown by certain stipulations between the parties, rested their case. Thereupon the defendant moved the court to direct the jury to render a verdict in its behalf. That motion was denied with exceptions to the defendant. At the close of all the evidence the jury by direction of the court returned a verdict in favor

of the plaintiffs for the sum of $14,068, and judgment for that sum with costs was entered against the defendant company. Upon writ of error to the Circuit Court of Appeals that judgment was affirmed. 51 U. S. App. 676.

The action was based upon four bills of lading issued by the railway company. Two of them were dated October 10th, and the others October 15th and October 23d respectively. They are alike in form, and identical in respect of the terms and conditions of the contract. Each one showed a receipt by the railway company of a given number of bales, "in apparent good order and well conditioned, of Castner & Co., for delivery to shippers' order or their assigns, at Liverpool, England, he or they paying freight and charges as per margin;" also, that the cotton received was to be carried "from Bonham, Texas, to Liverpool, England, route, via New Orleans and Elder, Dempster & Co. steamship line."

Each bill of lading contained also the following clauses:

"The terms and conditions hereof are understood and accepted by the owner.

"Upon the following terms and conditions, which are fully assented to and accepted by the owner, viz.:

"1. That the liability of the Texas and Pacific Railway Company, in respect to said cotton, and under this contract, is limited to its own line of railway, and will cease, and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; *and* in case of any loss, detriment or damage done to or sustained by said cotton before its arrival and delivery *at its final destination*, whereby any legal liability is incurred by *any* carrier, that carrier *alone* shall be held liable therefor in whose *actual custody* the cotton shall be at the time of such damage, detriment or loss.

"2. That the rate of freight for transportation of said cotton, specified in the margin hereof, is quoted and guaranteed with the distinct understanding and only on condition that the weight of said cotton is truly and correctly represented and stated; that said rate only includes the charge for transportation, and the specification of said rate shall not be taken as any guide for construction or evidence to extend this

contract in other respects, or to bind the Texas and Pacific Railway Company to transport or to become in anywise responsible for said cotton after delivery thereof to its next connecting carrier, but shall only bind said company to protect said rate. . . ."

"5. It is further agreed that in case said cotton is found at point of delivery to have been injured by any of the excepted clauses specified in this bill of lading, the burden of proof shall be upon the owner of said cotton or claimant to establish that such injury resulted from the fault of the carrier.

"6. That the said cotton shall be transported from the port of New Orleans to the port of Liverpool, England, by the Elder, Dempster & Co. steamship line, with liberty to ship by any other steamship or steamship line; and upon delivery of said cotton to said ocean carrier at the aforesaid port this contract is accomplished, and thereupon and thereafter the said cotton shall be subject to all the terms and conditions expressed in the bills of lading and master's receipt in use by the steamship or steamship company or connecting lines by which said cotton may be transported; and upon delivery of said cotton, at the usual place of delivery of the steamship or steamship lines carrying the same, at the port of destination the responsibility of the carriers shall cease."

The facts out of which the case arises are these: The railway company had warehouses and yards in New Orleans where its road terminated. Westwego is a branch station or terminal opposite that city. The company had a wharf with tracks and an office and sheds on it — the wharf having been constructed over the Mississippi River so that cars could be run upon the railroad tracks in its rear and unloaded, and so that vessels could come to its front to receive freight placed on it. The cotton in question was unloaded at the wharf at various dates from October 22, to November 4, 1894, and was burned while on the wharf in the evening of November 12, 1894.

On each of the bills of lading are the following words: "T. & P. contract No. 44." It does not appear that the shippers were informed what were the terms of that contract.

It was in proof, however, that it was in substance a contract with the Elder, Dempster & Co. steamship line to connect with the Texas and Pacific Railway Company and receive from the latter 20,000 bales of cotton during the months of October, November and December, 1894, on the conditions specified on the reverse side of the contract. Those conditions do not affect the questions here presented, but it was proved that the railway and the steamship companies agreed that the place of delivery of the cotton under the contract between them should be the wharf at Westwego.

The mode in which the railway company and the steamship company transacted business was as follows: Upon the shipment of cotton, bills of lading would be issued in Texas to the shipper. Thereupon the cotton would be loaded in the cars of the railway company and a way bill indicating the number and initial of the car, the number of the bill of lading, the date of shipment, the number of bales of cotton, the consignor, the consignee, the date of the bill of lading, the number of bales forwarded on that particular way bill, the marks of the cotton, the weight, rate, freights, amount prepaid, etc., would be given to the conductor of the train bringing the car to Westwego. Upon the receipt of the way bill and car at Westwego, a "skeleton" would be made out by the clerks at that place for the purpose of unloading the car properly. It contained the essential items of information covered by the way bill, and had also the date of the making of the skeleton. When this skeleton had thus been made out and the car had been pushed in on the side track in the rear of the wharf, it would be taken by a clerk known as a "check clerk," and with a gang of laborers, who actually handled the cotton and were employed by the railway company, the car would be opened; and as the cotton was taken from the car bale by bale the marks would be examined to see that they corresponded with the items on the skeleton, and the same were then checked. The cotton thus taken from the car was deposited at a place on the wharf designated by the check clerk, and it would remain there until the steamship company came and took it away. After the checking of the cotton in this

way to ascertain that the amounts, marks and general information of the way bill were correct, the skeleton would be transmitted to the general office of the Texas and Pacific Railway Company in New Orleans, which thereupon would make out what was designated as a "transfer sheet" that contained substantially the information contained in the way bill, and which being at once transmitted to the steamship company or its agents was a notification understood by the steamship company's agents that cotton for their line was on the wharf at Westwego ready for them to come and take away. Upon the receipt of these transfer sheets the steamship company would collate the transfers relating to such cotton as was destined by them for a particular vessel, advise the railway company with the return of the transfers that this cotton would be taken by the vessel named, and would thereupon send the vessel with their stevedores to the wharf at Westwego. The clerk at Westwego would go around the wharf and by the aid of the transfers returned from the steamship agents point out to the master or mate of the vessel, or the one in charge of the loading, the particular lots of cotton named in the transfers and designated for his vessel, and the stevedores and their helpers would thereupon take the cotton and put it on board the ship. In connection with the loading upon the vessel or after the cotton was pointed out in lots, the master or mate would sign a mate's receipt for this cotton. The stevedores and all men employed in loading the vessel were wholly in the employ of the steamship company. The time of coming to take cotton from the wharf was entirely in the control of the steamship company. They sent for it as soon as they were ready.

This was conceded to have been substantially the method of business between the railway company and the steamship company.

Counsel for the railway company correctly states that on the morning of the fire, and on other occasions prior thereto both in October and November, the officers of the railway company gave verbal notice to the steamship company that the cotton was upon the wharf ready for the steamship com

pany to take away and made request that the same should be removed; that the attention of the officers of the steamship company was called to the amount of cotton on the wharf which they had contracted to carry, and they were requested to move it at the earliest possible moment and to comply with their contract; and that in reply they said, in substance, that their ships had been delayed, the principal cause being certain labor troubles then existing in New Orleans with employés of the steamship companies, and another cause being the bad weather.

It may be taken as established by the evidence that the cotton in question was for some days before the fire in a position on the wharf ready to be taken by the steamship company.

So far as the management of the wharf and the protection of the cotton against fire were concerned, the evidence failed to show any negligence on the part of the railway company.

The defendant moved for a verdict in its behalf upon two grounds: 1. The evidence showed a delivery of the cotton to the connecting carrier before the fire occurred. 2. If no delivery took place before the fire, there had been a sufficient tender of the cotton to the steamship carrier, and thereafter, in view of the facts, the railway company should be deemed to have held it as a warehouseman, and as there was no proof of negligence it was not liable for the value of the cotton.

The principal question arises out of that clause in the bill of lading providing that in case of any loss, detriment or damage done to or sustained by the cotton before its arrival and delivery at its final destination, whereby liability was incurred by any carrier, that carrier *alone* should be held liable therefor in whose *actual* custody the cotton should be at the time of such damage, detriment or loss. The Circuit Court of Appeals and the Circuit Court concurred in the view that the cotton when burned was, within the meaning of the contract, in the actual custody of the railway company. It will not be disputed that in determining this question regard must be had to all the provisions of the contract. The clause declaring that the railway company should be deemed to have fully performed its part of the contract "upon delivery of said cotton

to its next connecting carrier" must be taken with the clause immediately following which makes that carrier alone liable who had actual custody of it at the time of the loss. The first thought suggested by these clauses, taken together, is that the parties recognized the possibility that it might be often difficult to determine what, as between carriers, in view of their relations to each other, would constitute a sufficient delivery to the connecting carrier. And in order to meet that difficulty the clause relating to actual custody was added, so as to indicate that the delivery intended, so far as liability to the shipper for loss was concerned, was not a constructive one, but such a delivery as involved actual custody of the cotton by the connecting carrier. We do not understand that counsel for the railway company dispute this general view. But they insist that within the meaning of the contract, and under the facts disclosed by the evidence, the steamship company had actual custody of the cotton at the time it was burned. In support of their contention they rely principally upon *Pratt* v. *Railway Company*, 95 U. S. 43, 46, and the cases upon which that case largely rests — *Merriam* v. *Hartford & New Haven Railroad Co.*, 20 Conn. 354, and *Converse* v. *Norwich & New York Transportation Co.*, 33 Conn. 166.

It is important to understand what were the facts upon which the judgment in *Pratt* v. *Railway Company* was based. According to the report of that case they were these:

The Grand Trunk Railway Company, engaged as a carrier in the transportation of property, had received at Montreal to be carried to Detroit certain goods shipped at Liverpool for St. Louis. The goods reached Detroit in the cars of that company on the 17th day of October, 1865, and were destroyed by fire in the night of the succeeding day.

The company had no freight room or depot at Detroit, but it used there a single section or apartment in the freight depot of the Michigan Central Railroad Company, a building several hundred feet long, three or four hundred feet wide, and all under one roof. Its different sections were without partition walls between them. In the centre of the building there was a railroad track for cars to be loaded with freight. The sec-

tion in that building used by the Grand Trunk Company was used only as a place for depositing goods and property that came over its road or that were delivered for shipment over it. In common with the rest of the building, that section was under the control and supervision of the Michigan Central Company.

The Grand Trunk Company employed in its section two men, who checked freight coming into it. But all freight that came into that section was handled exclusively by the employés of the Michigan Central Company, and the Grand Trunk Company paid that company a fixed compensation per hundredweight for such work as well as for the use of its section.

Goods coming into that section from the Grand Trunk Railroad to be carried over the road of the Michigan Central Company, after being unloaded were deposited by the employés of the latter company in a certain place in the Grand Trunk section, from which they were loaded into the cars of the Michigan Central Company by its own employés, whenever that company was ready to receive them; and after being so placed the employés of the Grand Trunk Company did not further handle such goods.

Whenever the agent of the Michigan Central Company saw any goods deposited in the section of the freight building used by the Grand Trunk Company and which were to be carried over the line of the former company, he would call on the agent of the latter company in the building, and from the way bill exhibited by the agent of the Grand Trunk Company take a list of such goods, and would then for the first time learn their place of destination, together with the amount of freight charges due thereon. From the information thus obtained a way bill would be made out by the Michigan Central Company for transportation of the goods over its line of railway, and not before.

The goods referred to in the *Pratt case* were taken from the Grand Trunk cars on the 17th day of October, 1865, and deposited in the apartment of the freight building used by the Grand Trunk Company in the place assigned for goods so destined.

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At the time the goods were forwarded from Montreal the way bill in accordance with usage in such cases was made out in duplicate, on which were entered a list of the goods, the names of the consignees, the places to which they were consigned, and the charges against them from Liverpool to Detroit. The conductor having charge of the train containing the goods would take one of these way bills, and on arriving at Detroit would deliver it to the checking clerk of the Grand Trunk Company, "from which said clerk checked said goods from the cars into said section." The other copy would be forwarded to the agent of the Grand Trunk Company at Detroit. "It was the practice of the Michigan Central Railroad Company, before forwarding such goods, to take from said way bill in the custody of said checking clerk, in the manner aforesaid, the place of destination and a list of said goods, and the amount of accumulated charges, and to collect the same, together with its own charges, of the connecting carrier."

This court, in view of these facts, said: "We are all of the opinion that these acts constituted a complete delivery of the goods to the Michigan Central Company, by which the liability of the Grand Trunk Company was terminated. 1. They were placed within the control of the agents of the Michigan Company. 2. They were deposited by one party and received by the other for transportation, the deposit being accessory merely to such transportation. 3. No further orders or directions from the Grand Trunk Company were expected by the receiving party. Except for the occurrence of the fire, the goods would have been loaded into the cars of the Michigan Central Company, and forwarded, without further action of the Grand Trunk Company. 4. Under the arrangement between the parties, the presence of the goods in the precise locality agreed upon, and the marks upon them, 'P. & F., St. Louis,' were sufficient notice that they were there for transportation over the Michigan road towards the city of St. Louis; and such was the understanding of both parties." Referring to the section of the freight building specially used by the Grand Trunk Company, the court said: "It was a por-

tion of the freight house of the Michigan Company, in which a precise spot was selected or set apart, where the defendant might deposit goods brought on its road and intended for transportation over the Michigan road, and which, by usage and practice and the expectation of the parties, were then under the control of the Michigan Company, and to be loaded on its cars at its convenience, without further orders from the defendant."

We do not think that the judgment in *Pratt* v. *Railway Company* controls the determination of the present case. In many important particulars the two cases are materially different. In the *Pratt case* the court proceeded upon the ground that the goods were deposited in a section of a freight building set apart by the connecting carrier, the owner of the building, for goods coming over the line of the first carrier to be transported in the cars of the connecting carrier to the place to which they were consigned, the goods having been unloaded by the employés of the connecting carrier and by them deposited in that section, to be put by such employés into the cars of that carrier at its convenience. It was a case in which the goods passed under the complete control and supervision and into the actual custody of the connecting carrier from the moment they were deposited in the section set apart for them.

In the case at bar, the facts plainly indicate that although the goods had been placed by the first carrier upon the wharf, and although that was the place at which the steamship company was to receive or usually received goods from the railway company for further transportation, they were not in the actual possession or under the actual control of the connecting carrier at the time of the fire. The connecting carrier had not given a mate's receipt for the cotton or assumed control of it. True, it had received notice that the goods were on the wharf and could be taken into possession, but such notice did not put the cotton into the actual custody of the connecting carrier. The opportunity given it to take possession or its mere readiness to take possession was not under the contract equivalent to placing the cotton in the actual

custody of the steamship line. The undertaking of the railway company was to transport safely and deliver to the next connecting carrier. But its further express agreement was, in substance, that if any carrier incurred liability to the shipper in respect of the goods, that carrier alone was to be liable who, at the time the cotton was damaged or lost, had it in actual custody. In other words, the delivery to the connecting carrier which would, as between the first carrier and the shipper, terminate the liability of such carrier, must have been a delivery that put the cotton into the actual, not constructive, custody of the connecting carrier. To hold otherwise is to eliminate from the contract the clause relating to actual custody. The entire argument of the learned counsel for the railway company in effect assumes that the contract means no more than it would mean if that clause were omitted. But the court cannot hold that that clause is meaningless, or that it was inserted in the contract in ignorance of the meaning of the words "actual custody." Nor can it be supposed that the parties understood the contract to mean that the connecting carrier was to be deemed to have actual custody from the moment it could have taken actual custody if it had seen proper to do so. So far as the shipper was concerned, the actual custody of the first carrier could not cease until it was in fact displaced by the actual custody of the connecting carrier. It may be that the railway company has good ground for saying that, as between it and the connecting carrier, the latter was bound to take actual custody whenever the railway company was ready to surrender possession, and thereby relieve the latter from possible liability to the shipper in the event of the loss of the cotton while in its custody. That is a matter between the two carriers, touching which we express no opinion. But we adjudge that the shipper cannot be compelled, when seeking damages for the value of his cotton destroyed by fire in the course of its transportation, to look to any carrier except the one who had actual custody of it at the time of the fire. One of the conditions imposed upon him by the contract was that if any carrier became liable to him he should have no remedy except against the one having such

actual custody. That remedy should not be taken from him by a construction of the contract inconsistent with the ordinary meaning of the words used.

The two cases in the Supreme Court of Connecticut which were cited in *Pratt* v. *Railway Co.*, undoubtedly sustain the principles announced in that case, but they do not militate against the views we have expressed in this case.

Merriam v. *Hartford & New Haven Railroad Co.*, 20 Conn. 354, 360, was an action on the case for negligence on the part of a railroad company in the transportation and delivery of certain goods, and in which it was a question whether the goods had been delivered to the company before their destruction. After stating the general rule to be that, in order to charge a common carrier for the loss of property delivered to it for transportation, the property must be delivered into the hands of the carrier itself or its servant or some person authorized by the carrier to receive it, and that if it was merely deposited in the yard of an inn, or upon a wharf to which the carrier resorts, or in the carrier's cart, vessel or carriage, without the knowledge and acceptance of the carrier, its servants or agents, there would be no sufficient delivery to charge the carrier, the court said: "But this rule is subject to any conventional arrangement between the parties in regard to the mode of delivery, and prevails only where there is no such arrangement. It is competent for them to make such stipulations on the subject as they see fit; and when made, they, and not the general law, are to govern. If therefore they agree that the property may be deposited for transportation at any particular place, without any express notice to the carrier, such deposit merely would be a sufficient delivery. So if, in this case the defendants had not agreed to dispense with the express notice of the delivery of the property on their dock, actual notice thereof to them would have been necessary; but if there was such an agreement, the deposit of it there, merely, would amount to constructive notice to the defendants, and constitute an acceptance of it by them. And we have no doubt, that the proof by the plaintiff of a constant and habitual practice and usage of the

defendants to receive property at their dock for transportation, in the manner in which it was deposited by the plaintiff, and without any special notice of such deposit, was competent, and in this case, sufficient to show a public offer, by the defendants, to receive property for that purpose and in that mode; and that the delivery of it there accordingly by the plaintiff in pursuance of such offer should be deemed a compliance with it on his part, and so to constitute an agreement between the parties by the terms of which the property, if so deposited, should be considered as delivered to the defendants without any other notice. Such practice and usage were tantamount to an open declaration, a public advertisement, by the defendants, that such a delivery should of itself be deemed an acceptance of it by them for the purpose of transportation; and to permit them to set up against those who had been thereby induced to omit it, the formality of an express notice, which had thus been waived, would be sanctioning the greatest injustice and the most palpable fraud."

Converse v. *Norwich and New York Transportation Co.*, 33 Conn. 166, 181, involved the question whether certain goods had been delivered to the connecting carrier prior to their destruction by fire. The wharf and depot building in which the goods were deposited by the first carrier were owned by the connecting carrier, and the first carrier paid an annual rental for its use in its business. The court, among other things, said: "We have no difficulty in determining, indeed we must hold, that there was a mutual agreement, or tacit understanding equivalent to such an agreement, that the transportation company should place the through freight at that precise spot, and that the Northern road should take it from thence at a time convenient to them. The construction of the depot and the uniform usage are conclusive of it. The depot was constructed with a platform by the side of the track for the reception of goods to be taken from or put into the cars; and on that platform the railroad company in the first and every instance of delivery by them placed their freight, and the transportation company at their convenience took it away and carried it on board their boat. And so the trans-

portation company in like manner, in the first and every instance, placed there the freight for the Northern road; and they at their convenience put it in their cars and took it away. And the usage was precisely the same with the Worcester road. . . . Upon this wharf and into the enclosure the Northern road laid their track for the delivery and reception of freight to and from the transportation company. Both parties then contemplated a delivery and reception on this wharf and in this enclosure, and obviously in the precise manner actually pursued. . . . It is clear then that both the transportation company and the Northern road contemplated that a placing of freight by either intended for the other upon that platform was all that either was to do by way of delivery of their freight to each other."

It is to be observed that neither in the *Pratt case* nor in the *Converse* and *Merriam cases* was there any clause in the contract between the parties to the effect that the shipper, in enforcing his claim for liability, should look alone to the carrier who had the actual custody of the goods at the time they were lost or destroyed. It is the clause of that character in the bill of lading now in suit which makes the judgments in the *Pratt*, *Converse* and *Merriam cases* inapplicable to the present case.

A further contention of the defendant is that at the time of the fire it held the goods, if at all, only as a warehouseman and not as a common carrier, and that the Circuit Court erred in not so instructing the jury. We cannot assent to this view. As the goods had not at the time of the fire passed into the actual custody of the steamship company, and as the contract expressly declared that if any carrier was liable for their destruction that one alone should be liable in whose actual custody the goods were when destroyed, the defendant could not escape responsibility by showing that the connecting carrier could by reasonable diligence have taken actual custody prior to the fire. In other words, it could not convert itself into a warehouseman by proving that it had, before the fire, tendered the goods to the connecting carrier, and that the latter neglected, although without reasonable excuse, to take them

into its actual custody. Even if this were not so, the suggestion that the railway company had become a warehouseman before the fire occurred can be disposed of on the grounds stated by the Circuit Court of Appeals. Speaking by Judge Wallace, that court said: "There is no room for the contention that the defendant had ceased to be a carrier and became a warehouseman. It had done no act evidencing its intention to renounce the one capacity and assume the other. Although it had requested the steamship line to remove the cotton, it had not specified any particular time within which compliance was insisted on, and had not given notice that the cotton would be kept or stored at the risk of the steamship line upon failure to comply with the request. The request to come and remove it 'as soon as practicable' was, in effect, one to remove it at the earliest convenience of the steamship line. There is nothing in the case to indicate that the defendant had not acquiesced in the delay which intervened between the request and the fire." 51 U. S. App. 676, 686.

Under the views expressed in this opinion, it is unnecessary to enter upon a review of the numerous cases cited by counsel for the railway company in their able and elaborate brief to support the different propositions discussed by them.

We are of opinion that the Circuit Court did not err in directing a verdict for the plaintiff, and the judgment is

Affirmed.